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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 748

HARRY F. SINCLAIR, HENRY MASON DAY, WILLIAM J. BURNS, W. SHERMAN BURNS,
APPELLANTS,

vs.

UNITED STATES.

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANT, WILLIAM J. BURNS, ON THE ENTIRE RECORD.

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Statement of the Case.

This case is before the Supreme Court of the United States upon certification to it by the Court of Appeals of the District of Columbia of certain questions of

law. After motion was made by the Government counsel which was joined in by counsel for the appellants, this Court made and entered the following order:

> *In Consideration* of the motion to bring up the entire record and cause herein and advance the case for argument on Monday, April 22nd, next,
>
> *It is now here ordered* that the said motion be, and the same is hereby granted."

This appellant, William J. Burns, was one of the respondents below and appeals from the judgment of the lower court finding him guilty of criminal contempt of court, and from the imposition of a sentence of imprisonment for a period of fifteen days in the Washington Asylum and Jail.

That part of the petition which relates particularly to this appellant states:

> "And that the said William J. Burns actively engaged in conducting the affairs of said agency, although not an officer of the same, was one of the founders thereof, and his wife holding forty-seven of the fifty shares of capital stock of said agency, that said William J. Burns, in said indirect fashion, receives monies and other benefits from the holding of said stock in his wife's name; and that the said William J. Burns visited the City of Washington, in said District of Columbia, with regard to the operations hereinbefore described of the agents of the William J. Burns International Detective Agency and remained in the City of Washington, to wit, on October 12th and 13th, 1927, and thereafter, to wit, on the third day of November, 1927, the said

William J. Burns returned to the City of Washington, in said District of Columbia, where he and the said W. Sherman Burns, in furtherance of said designs of said respondents, procured the making of a false affidavit purporting to show that a representative of the United States, Department of Justice, approached and held conversation with said Norman L. Glasscock, a juror in said cause, as aforesaid, and that the said William J. Burns and the said W. Sherman Burns, knowing said affidavit to be false and without truth and fact, did then and there procure the submission of said affidavit to said Honorable Frederick L. Siddons, Associate Justice of the Supreme Court of the District of Columbia, intending thereby to provide evidence, such as it was, that the United States of America, through one of its employees, had tampered with said juror in the case of United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43324 (Rec. 5).

Without fear of contradition from the Record, it can be positively and definitely stated that William J. Burns had nothing whatever to do with the surveillance of the jury in the Fall-Sinclair criminal case, nor was he consulted about it nor did he know that it was being done until after it had ended; and further, that he had nothing to do with, and knew nothing about, the making and filing of the so called McMullin affidavit, until it had been prepared, signed, sworn to and handed to Justice Siddons.

In its vain attempt to prove the charges against this appellant, the Government produced as a witness

Raymond J. Burns, a son of this appellant, and the President of the William J. Burns International Detective Agency, (hereinafter for convenience called the "Burns Agency"). Raymond J. Burns testified in substance as follows: The Burns Agency is a corporation, incorporated under the laws of New York in 1909. The witness and this appellant were the founders. At the time of the shadowing of the jury in the criminal case, the witness was President, and his brother, W. Sherman Burns, was Secretary and Treasurer (Rec. 671). There are three stockholders, Annie M. Burns, the wife of this appellant, who owns 47 shares, out of a total of 50; W. Sherman Burns, a son, who owns 2 shares; and Florence Seipel, a sister of this appellant, who owns 1 share. This appellant is retained by the Burns Agency in an advisory capacity at an annual fee of $5,200, which arrangement commenced in 1925, and is still in force, and entitles the Agency to call upon this appellant whenever it should be deemed advisable to consult with him. This appellant has no office at the headquarters of the Agency. He was formerly President, but resigned in 1921 when he entered the service of the Government as the Director of the Bureau of Investigation, and for the last two years has taken no part in the activities of the Agency. Sometimes this appellant comes to the office —possibly once a week, and maybe twice a month. This appellant has a real estate office "up town" in New York. The witness further stated that since he, the witness, had been President, and since this appellant's salary or fee as advisor had commenced in 1925,

this appellant has done no work in connection with the Burns Agency, not even as an advisor or consultant, unless his advice was solicited by the witness and his brother, W. Sherman Burns; *and that the appellant's advice was not sought nor given in connection with the particular employment of shadowing the jury in the Fall-Sinclair criminal case* (Rec. 672).

Charles G. Ruddy, another witness for the Government, stated:

> "To my knowledge William J. Burns has had no active connection with the Agency in the last two or three years. I have known him to sit in an advisory capacity on special cases. I do not know whether or not he was informed of this employment and consulted in any way about it. I did not advise with him about any phase of this particular work while it was in operation. I had no talk with him on the subject one way or the other until after the grand jury investigation started. I did not even know the whereabouts of W. J. Burns up to that time. I did not exchange words with him on the subject in the remotest fashion at any time before the warrant and the seizure of the records at the Wardman Park Hotel, nor until the Saturday following the Monday on which the raid was made." (Rec. 378) "I first talked to William J. Burns on Saturday the fifth of November, at the Woodward Hotel, New York City" (Rec. 381).

Government's witness Frank J. O'Reilly, who was Ruddy's assistant in the work of shadowing the jury, said on the witness stand:

> "I met William J. Burns for the first time in my life on the morning of November 7, 1927, upstairs in the court house, when I was on subpena to the grand jury. I requested that morning to be introduced that morning. As far as I know, he had nothing whatsoever to do with this matter." (Rec., 433.) "I first met William J. Burns Monday morning, November 7th. It was upstairs in this building." (Rec., 436.)

Counsel for this appellant admitted, without the necessity of proof, that this appellant was in Washington on October 12 and 13, 1927, and registered at the Willard Hotel. (Rec., 677.) *There was not even an attempt to prove that this appellant saw, conversed with, or had the slightest contact with Fall or Sinclair, or their agents while he was in Washington, or at any time or place. Nor is there the slightest evidence in the record of any such fact.* (The criminal trial of Fall and Sinclair commenced on October 17, 1927.)

Such was the sum and substance of all that the Government was able to prove regarding the connection of this appellant with the Burns Agency, and with the shadowing or surveillance of the jury in the Fall-Sinclair criminal case.

W. Sherman Burns, one of the respondents, took the stand in his own behalf, and testified concerning the connection of this appellant with the Burns Agency and of his lack of knowledge and connection with the shadowing of the jury in the Fall-Sinclair criminal case as follows:

> "Prior to 1921, W. J. Burns was president of the Agency, and, I think, a director. In 1921 he

resigned as president and director, and severed all connections with the agency, and took the position of Director of the Bureau of Investigation of the Department of Justice. On his resignation from the Government he would advise with us. He became adviser under a yearly retainer in 1925 or 1926, and that is the only connection he had. From 1921, when he resigned the position as director and president, to become Director of the Bureau of Investigation of the Department of Justice, down to his severing his connection with the Department of Justice, he had absoultely no connection with, and no participation in, the work of the Agency, advisory or otherwise. Then after he resigned his position as Director of the Bureau of Investigation of the Department of Justice he became advisor to the Agency. In that capacity he would make periodical visits to the office whenever we would request him, or whenever we desired to consult with him, and of course he had old clients who might want to consult with him from time to time; but it was a casual connection, and only when we sought his advice did he advance it. He did not come to the office of the Agency with any regularity. For example, the summer of 1927 he spent the entire time in Florida, directing his home there in Sarasota. I do not think he got back until the latter part of August or September. From January 1, 1927, until November 1, 1927, he was not in the office in an advisory capacity or any other capacity, any substantial number of times. He might come to the office once in 2 weeks. If there was any mail directed to him there one of our secretaries would call him on

the phone and tell him there was some mail, or might send it up. If a telegram came in for him, it would be opened and read to him over the telephone. That was mostly private correspondence. Raymond Burns did not have occasion to advise with W. J. Burns on the business of the Agency more than half a dozen times between January 1 and November 1 of 1927. I cannot recall any specific investigation that we had on which we sought his direct advice. We may have discussed the affairs of the organization not over half a dozen times. Between 1925 and the end of 1927, W. J. Burns took part in the affairs or business or activities of the Agency only when his advice was sought. I now remember one investigation he took part in as advisor in the spring of 1927. W. J. Burns had no place, no office, no desk or any of the other appointments of an occupant of an office, in our suite at 165 Broadway at any time during 1927. When he comes to the office he goes into Raymond Burns' office, or sometimes into my office. *I did not consult W. J. Burns before I accepted the employment of Mr. Day in this matter. I did not tell him that I was going to do it, or tell him afterwards that I had done it, at any time before the seizure of the records of the Agency at Wardman Park. I did not discuss this employment nor this operation with him until Tuesday, November 1, on the telephone, after the publicity of the seizure of the records. He did not have any knowledge whatever of the fact that the work was going on between October 18 and November 1.*" (Rec., 774, 775.)

Upon being examined by the court, W. Sherman Burns stated:

> "I think my father is about 65 or 66 years old. After he had severed his connection with the Agency and after he had also severed his connection with the Government service and returned home, he occasionally would consult or advise with some of his old clients. I can't remember any specific case during that time where he actually employed the Agency to do the work required by one of the old clients, but if an old client had requested him he would have referred him to the Agency. For some period after he left the Government service he was ill and in Europe. I can't recall any specific instances right now of his employing the Agency for an old client during that period." (Rec., 786.)

This appellant testified concerning the same matter as follows:

> "When I finished that I organized the William J. Burns International Detective Agency in 1909 and remained at the head of that until 1921. In August, 1921, I was appointed Director of the Bureau of Investigation of the Department of Justice and I resigned from there the latter part of 1924. Just before I resigned from the Burns Agency, I was president of the corporation. I resigned as president, and had no connection with the Agency whatever before I was appointed Director of the Bureau of Investigation. When I resigned from the Agency my son, Raymond J. Burns, succeeded me as

president, and Sherman Burns succeeded Raymond as secretary and treasurer of the corporation. That relationship has continued until the present time. I had no position whatever, advisory or otherwise, with the Agency while I was Director of the Bureau of Investigation. I am now connected with the Agency in an advisory capacity whenever I am called upon by my sons to pass on any matters that they may be handling that they want my advice on. I do nothing whatever in connection with the activities of the Burns Agency unless I am called upon, and then it is only for advice. I became advisor to the Agency in 1925. I have a retainer of $5,200 a year. Since I became advisor, I have not had an office in the Burns offices in New York, or anywhere else. I had desk room in 350 Madison Avenue as a licensed real estate broker. That has no connection, in location or otherwise, with the Burns Agency. I was not consulted, and did no work of any kind in the Agency in 1927, that I remember of. I was in New York in October, 1927. I was in the office of the Agency very, very seldom during the months of September and October. I was preparing to move to Florida. The offices of the Burns Agency in New York are at 165 Broadway. They had the same offices in 1927 and 1926. The Madison Avenue office was uptown, beyond 42nd Street. *I had nothing whatever to do with the employment of the Burns Agency by Mr. Day in October, 1927, and knew nothing about it until it was all over. The first I knew of it was on November 1st, the day after the Burns operatives were subpænaed before the grand jury, and after the search warrant*

was executed and the records seized. A newspaper man in New York called me on the telephone to inquire whether or not I desired to make a statement concerning the Washington matter. As I didn't know anything about any Washington matter in which they were interested, I inquired as to what it was and learned. That was the first time I had heard of the matter at all in any way. From the time of the employment on October 18th down to and including November 1st, I had had nothing to do with the matter and had no information concerning it at all. My advice had not been asked about it one way or the other." (Rec., 744, 745, 746.)

On cross-examination he stated:

> "I have known Harry F. Sinclair a number of years and have done detective work for him for a number of years. The Agency was not employed by him in some capacity at the time the Fall-Sinclair case was being tried." (Rec., 752.)

To meet the insinuation of suspicion, erroneous and unfounded as it might be, that this appellant came to Washington on October 12 and 13, 1927, in some relation to the employment of the Burns Agency, uncontradicted evidence was introduced by this appellant which conclusively showed that the visit to Washington on those days had no connection whatever with shadowing of the jury.

This appellant stated on the witness stand:

> "I came to Washington on Wednesday, October 12th about 8 p. m. in response to the tele-

gram that has been read here. I met Mr. Dadswell at the Willard Hotel and he and I went to the Radio Commission's office and were there until noon. The young lady testified that we were there about an hour. We were there from 9 o'clock in the morning until almost 12 o'clock. We went to see Admiral Bullard with a view of having the broadcasting station of the Financial Journal, that was then located in Tampa, Station WJBB, transferred from Tampa to Sarasota. We were given that privilege and it was transferred. I left Washington the afternoon of the 13th on the Congressional, and returned to New York. I was not here on any other business than this radio business, and I did not transact any other business. I cannot recall everybody that I saw here on that occasion. I was with Elmer Dover after I got through with Mr. Dadswell, and remained with him until we both went to the station. He went west and I went to New York. *I did not see Mr. Sinclair or Mr. Day while I was here, nor did I talk with either one of them. I did not talk with their lawyers or with anybody connected with the Fall-Sinclair case.* I was not in Washington on November 3rd, nor was I here at any time during the fall of 1927 before I came here on the 13th on the radio business, which was the first time I had been here for months. I was not here at any time between October 13th and November 6th. I did not give Ruddy any instructions of any kind or character pertaining to this operation by telephone, letter, or otherwise. I did not give any instruction to any of the operatives in connection with the work. I had no conversation with Mr. Sinclair or Mr.

Day in connection with the work done here in October, either before, while it was being done, or afterward. I had no part at all in making arrangements for the employment of the Burns Agency to do this work. I first saw Mr. Day when this proceeding started here on December 5th. I had never seen him before we assembled in court on that day. I had never talked with him before, nor had any communication with him before of any kind on any subject; no business talk with him, direct or indirect; no social or other kind of contact with him, direct or indirect, up to that day." (Rec. 750-751).

The testimony of Jack E. Dadswell, a resident of Sarasota, Florida, has such an important bearing on the case that we here quote it in its entirety:

"I live at 126 13th Street, North Street, Petersburg, Florida. I know William J. Burns. I was in Washington October 13, 1927. I had a business appointment with W. J. Burns and Admiral Bullard. I met Mr. Burns on October 13th, at about 8.45 a. m., at the Willard Hotel. I had made arrangements to meet Mr. Burns before coming here by telegraphing him from Sarasota, Florida to New York. (Witness was handed a paper.) This is the telegram I had sent to Mr. Burns. Mr. Hitchings is the president of the Bank of Sarasota and Chairman of the Radio Committee of the Chamber of Commerce of Sarasota. I was with Mr. Hitchings when he sent that telegram to Mr. Burns. I came here on behalf of the Chamber of Commerce of Sarasota, Florida. (Witness was handed a telegram from W. J. Burns to

Mr. Hitchings.) I received from the Western Union Telegraph Office before I left Sarasota and came to Washington this telegram, a telegram similar to this, giving this same substance, the time at which Mr. Burns would meet me at the place, and fixing the date. I do not think the telegram was addressed to me, but was addressed to the Chamber of Commerce, or to Mr. Hitchings, but in substance it was delivered to me, giving the time at which I was to meet Mr. Burns. I imagine the telegram was handed to me or shown to me, at least the contents of a telegram. I left Sarasota for Washington and I met Mr. Burns at a specified time, at a specified place in this city on a specified day in conformity with the telegram which was shown to me.

"Thereupon the respondents offered in evidence the following:

"RESPONDENTS' EXHIBIT No. 21."

"93N F Nw 47 Blue Xu.

Sarasota Flo 242P Oct. 10, 1927.

Wm. J. Burns,
Suite 1125 165 Bway.

Would it be possible for you to meet with Mr. Dadswell at Federal Radio Commissioners Office Washington DC and confer with Mr. Bullard Chairman Thursday morning at nine am stop very important as Dadswell is moving the Financial Journal broadcasing station from Tampa to Sarasota wire answer.

C. E. HITCHINGS,
325P."

The witness continued:

"I have not got the original telegram signed by Mr. Burns in New York and sent to Mr. Hitchings in Sarasota. It is in the files at the Chamber of Commerce in Sarasota. I saw the telegram that Hitchings sent Burns in New York, asking him to meet me in Washington on Thursday morning at the Radio Commissioner's Office. Before I came from Sarasota to Washington Hitchings or I received word from Mr. Burns to the effect that he would meet me here. This is the reason I came to Washington, as the result of that telegram from Mr. Burns. I got here about 7 a. m. on October 13th. I stopped at the Raleigh Hotel. I met Mr. Burns at the Willard at 8:45 and he and I went immediately to the Commerce Building, to the office of the Radio Commissioner. We were there from about 9 o'clock to about 12:30. One of the objects of the conference was to confer with Admiral Bullard at this place. I left Washington about 10 o'clock that night. I had a conversation with Mr. Burns near the Willard. After it, Mr. Burns went to his office in Washington and I went to the hotel. The conversation was just before we parted. The subject of that conversation was as to where I would be able to get hold of Mr. Burns during a certain period of that day." (Rec. 727, 728 and 729).

Lois I Stuntz, secretary to the late Admiral Bullard, stated in her testimony:

"I am employed by the Federal Radio Commission. I know William J. Burns by sight. I remember Mr. Burns being in the office of Ad-

> miral Bullard sometime in the fall, but I cannot state offhand the exact date. He was there on business with Admiral Bullard. Mr. Dadswell of Florida was with him. They were there possibly an hour or two. To the best of my memory they were there only once on this business." (Rec. 740).

The appellant, Henry Mason Day, who employed the Burns Agency, stated concerning the employment:

> "I never at any time had any contact by phone or personally, or any communication with W. J. Burns about this matter." (Rec. 832).

This completes the résumé of all the testimony, on both sides, concerning the connection, or the lack of connection, of this appellant with the employment of the Burns Agency in the surveillance of the jurors, prior to their discharge and to the mistrial in the Fall-Sinclair criminal case.

We now proceed to recount the evidence concerning the connection of this appellant with the procurement of the false McMullin affidavit, namely, the evidence relating to the charge in the petition that: " • • • thereafter, to wit, *on the third day of November, 1927*, the said William J. Burns, returned to the *City of Washington, in said District of Columbia*, when he and the said W. Sherman Burns, in furtherance of said designs of said respondents, procured the making of a false affidavit • • •."

This appellant emphatically stated on the stand that he was not in Washington on November 3, 1927, and that he was not here any time between October 13, 1927,

when he was about the radio business, and November 6th, when he came to testify before the grand jury, and that he had nothing to do with making of the false affidavit. (Rec. 750). W. Sherman Burns was not in Washington at all that Fall, until called before the grand jury on *November 6th, several days after the mistrial.* There is no evidence to the contrary in the entire record. *Indeed, it was admitted on the record by the District Attorney that this appellant and his son were not in Washington on November 3rd, and did not take part in the procurement of the false affidavit.* The following coloquy occurred during the trial below:

> "Mr. Douglas: I would like to inquire, if the District Attorney could see his way clear to answer it, whether or not he means by his statement to say that he intended to prove that W. J. Burns and Sherman Burns were here and caused this affidavit to be made by this man (McMullin).
>
> "Mr. Gordon: *No, they were not here at that* time." (Rec. 622.)

Thomas E. Lodge, an attorney who assisted in the preparation of the McMullin affidavit, and who later handed it to Justice Siddons, was placed upon the stand by the Government. Under the examination by the Assistant District Attorney he testified merely to the fact that on November 2nd, the day before the affidavit was prepared, and two or three days after the mistrial, he had a conversation over the long dis-

tance phone with this appellant (Rec. 664). On cross-examination by the attorney for this appellant the witness was asked this question concerning that conversation:

> "Your conversation over the telephone was with reference to seeing the District Attorney, wasn't it?"

To that question the District Attorney objected, and the court refused to let the witness testify as to what was said, and an exception was duly noted. (Rec. 667.)

However, Lodge was later produced as a witness for this appellant, and testified concerning the topic of the conversation as follows:

> "My conversation with W. J. Burns on the long distance telephone was a week before Mr. Burns was down here before the grand jury. That conversation had no reference whatever to the McMullin or Long affidavit, and no reference to the conduct of the Burns Agency under the employment by Mr. Day. It did have reference to the newspaper articles then being published in the press that Mr. Burns thought were injurious to the Agency." (Rec. 739.)

Judge Daniel Thew Wright, who prepared the McMullin affidavit, was not called as a witness by the Government, but as a witness for the respondents. He said:

> "I have known W. J. Burns for 20 years, or longer. I had not seen him for a long time until one day after he had been subpœnaed down

here before the grand jury. He came into my office with his son Sherman. He said he was in town and just came in to pay his respects, and introduce me to Sherman. I came out and shook hands with them. That was during the week he was here as a witness before the grand jury, commencing November 7th. *I had no communication with the Burns, either direct or indirect, about this affidavit before it was prepared.* * * * *I had not talked with anybody who was connected with the Burns Agency, except Long, or McMullin, about drawing this affidavit, prior to the time it was drawn.*" (Rec. 736.)

McMullin when on the stand, under the direction of the District Attorney, testified concerning the making of the false affidavit:

"He (Ruddy) also told me it would be pretty bad for me if I did not go through with it. He said it was under the instructions of W. J. Burns.

"Thereupon a motion was made to strike out the last sentence, the motion was overruled, and an exception noted, and the witness continued:

"He said that W. J. Burns had given him instructions that he wanted this affidavit made for the client. * * * " (Rec. 623.)

At the conclusion of the Government's case, the above motion was renewed, but was overruled and exception noted. (Rec. 697.)

Ruddy, who had theretofore been used by the Government as one of its principal, if not its most im-

portant witness, testified when called as a witness for the respondents as follows:

> "At the time of the making of this affidavit on the night of the 3rd I had absolutely no doubt concerning the integrity or accuracy of this report of October 22nd, when the affidavit was drawn and signed and sworn to by McMullin. I did not request him to make that affidavit. I did not tell him that W. J. Burns wanted either the report of October 22nd or the affidavit made based thereon for the use of his clients. W. J. Burns never requested me, suggested to me the making of that affidavit. *I had not spoken to or seen W. J. Burns since the previous February.*" (Rec. 762.)

The next testimony which we proceed to recount is that relating to the charge that this appellant, together with his son, the appellant W. Sherman Burns, procured the *submission* of the McMullin affidavit to Justice Siddons on November 3, 1927; that is to say that portion of the petition which states:

> "* * * and that the said William J. Burns and the said W. Sherman Burns, knowing the said affidavit to be false and without truth and fact, did *then* (November 3, 1927), and *there* (Washington, D. C.), procure the submission of said affidavit to said Honorable Frederick L. Siddons, Associate Justice of the Supreme Court of the District of Columbia * * *."

We have hereinbefore shown that this appellant was not in Washington on November 3, 1927, and that the Government abandoned its charge that he was.

As has already been stated, Thomas E. Lodge, who submitted the affidavit to Justice Siddons, was called as a witness for the Government, and was permitted by the court to state merely that he had a conversation over the long distance phone with this appellant on November 2nd, the day before the submission of the affidavit, with all its unfair inference, without the corresponding right to this appellant on cross-examination to bring out what that conversation was. The Government brought out the fact also on direct examination that the witness had submitted the affidavit to Justice Siddons (Rec. 665), but on cross-examination by this appellant's counsel the following occurred:

> "I put nothing whatever in the shape of writing on the backs of those affidavits. Whatever endorsements were placed there after I had handed them to the Judge and by someone else that I do not know of. I had a very, very brief conversation with the Judge, if conversation is a mere sentence. I did not file those affidavits in the Sinclair-Fall case in the Clerk's office. I did not cause them to be filed by anyone.
>
> "Thereupon the following occurred:
>
> "Q. Did you request or direct anyone to file them?
>
> "The question was objected to, the objection sustained, and an exception duly noted.
>
> "Q. *Did you have any authority from William J. Burns, Sherman Burns or Vietsch or anyone else to file those affidavits?*
>
> "The question was objected to, the objection sustained, and an exception duly noted.
>
> "Q. When you handed these affidavits to Justice Siddons, what conversation did you have

with the Judge, or what did you say to him concerning these affidavits?

"The question was objected to, the objection sustained, and exception duly noted." (Rec. 668 and 669.)

When he was called as a witness for the appellants, he gave the following testimony:

"I was never authorized or directed either by William J. Burns or Sherman Burns, or Charles L. Vietsch to deliver those affidavits to Justice Siddons. I hadn't talked to them. I am reasonably satisfied, although not positive, that it was W. J. Burns, and not Raymond or Sherman who I talked to by long distance telephone on Wednesday preceding the week W. J. and Sherman Burns were down here. The subject was to the effect that the press was carrying at that time.

"Thereupon the conversation was objected to as incompetent, irrelevant and immaterial.

"Mr. Douglas: It is only for the purpose of rebutting any inference that the conversation of W. J. Burns had any reference to the affidavits, or any reference to his participation in the affairs of the Burns Agency. All I wish to do is to show what was the subject of that conversation.

"The objection was sustained, and an exception duly noted." (Rec. 738)

Later Ledge testified:

"My conversation with W. J. Burns on the long distance telephone was a week before Mr. Burns was down here before the grand jury.

> That conversation had no reference whatever to the McMullin or Long affidavit, and no reference to the conduct of the Burns Agency under the employment by Mr. Day. It did have reference to the newspaper articles then being published in the press that Mr. Burns thought were injurious to the Agency." (Rec. 739)

Ruddy, who consulted with Lodge in the matter of the affidavit, testified as a witness for the Government that this appellant had nothing to do with the affidavit, (Rec. 378), and that he "first talked with William J. Burns on Saturday, the fifth of November, (the day after the affidavit was handed to Justice Siddons) at the Woodward Hotel, New York City." (Rec. 381.) He testified substantially the same when called to testify for the appellants (Rec. 762).

The testimony of W. Sherman Burns hereinbefore stated is substantially to the same effect.

John R. Fitzpatrick, the Secretary to Justice Siddons, gave an account on the stand of the submission of the affidavit by Lodge to Justice Siddons. He said:

> "He handed those two affidavits to Mr. Justice Siddons, who thereafter handed them back to Mr. Lodge, who then handed them to me. I first put them in a place in the office and kept them under my personal supervision. Thereafter I took them and handed them to Mr. Justice Siddons. I never brought them to the Clerk's office, or caused them to be sent to the Clerk's office. The last I saw of them they were in the possession of Mr. Cunningham, the Clerk of this court, who was then in our office.

Mr. Justice Siddons handed them to Mr. Cunningham.

"Thereupon the witness was cross-examined as follows:

"When Lodge handed these two affidavits to the Justice, they were folded. Before handing them to the Justice he did not read them to him. Justice Siddons didn't read them while he had them in his hands before handing them to him. When Mr. Lodge handed those affidavits to Justice Siddons he said that he represented the Burns people. He used the name 'William J. Burns,' *but whether he used that as the name of an individual or part of the name of the Agency I am not now clear.* He stated that he presented—I use the word 'presented'—I do not attempt to quote the exact words; he may not have used it—the affidavits on behalf of the Burns people. He repeated that several times, using the phrase *'Burns people,'* and using the phrase *'William J. Burns,'* and also *'The International Detective Agency.'* He stated that they were for the information of the Justice. To the best of my recollection he did not also state that he felt it his duty as a member of the bar of the court to present these affidavits to the Justice. *I cannot tell whether he used the name 'W. J. Burns' as a corporate or an individual name."* (Rec. 695)

Although there was no charge that this appellant *filed* the McMullin affidavit, and although Justice Siddons stated in open court during the trial below that he, the court, had filed the affidavit (Rec. 1, Addition), the Government sought to prove that this appellant

filed the false affidavit, and introduced the following testimony of two newspaper reporters:

George E. Durno testified as follows:

> "I know W. J. Burns in a newspaper way. I saw him on the morning of November 7, 1927, in the corridor outside of the grand jury room. A number of other newspaper men were present. I saw W. J. Burns coming from the direction of the grand jury room. On the occasion of that meeting, a conversation ensued. He addressed all the newspaper men. W. J. Burns gave us copies of the affidavit signed by William V. Long. He said he had filed it with Justice Siddons on the Friday preceding and wanted to know why the Government had not done something about that. He said, 'All of our investigations show that the only tampering was done by the Government itself.' He said that the public was being misled into believing that the defense in the oil trial had no right to keep the jury under surveillance but that as a matter of fact as long as there was no approach, that the defense had the same privilege in that respect as the Government; that all of the Burns Agents had been honest and sincere." (Rec. 673-4.)

Edward J. Duffy testified:

> "I know W. J. Burns by sight. I saw him the day he testified before the grand jury. I am not able to fix the day. Mr. George Durno was present on that occasion, and there ensued a conversation. I was only there about the first five minutes. Mr. Stoddard and Mr. Burns

reached the middle of the hall, and he said that the newspaper had only showed one side of the case, and if we were willing to listen to him then, he was willing to give the other side of the case and would prove that the only tampering that had been done had been done by the Government, and affidavits to that effect were filed, and he charged the Government with keeping them from the public and asked us why we didn't go after them and give both sides of the case. To the best of my recollection he said he filed the affidavits. While I was there no reference was made to an attorney named Lodge. I don't think there was any reference to the time that such affidavits had been filed." (Rec. 674.)

"To the best of my recollection W. J. Burns said: 'I had filed.' There was some doubt in my mind as to what he said until I looked up our stories in the office and found they said that Mr. Burns said he had filed the affidavits. To the best of my recollection he used the word 'filed,' but he might have used something else. I went to the clerk's office and asked the clerk there if he knew of any such affidavits being filed, and he said 'no.' While I was there, Mr. Burns did not point to Mr. King and say, 'there is the only man that has been tampering with the jury and he ought to be put in jail.' I did not hear that part of the conversation." (Rec. 675.)

There is a mass of testimony relating to what was done by this appellant after he came to Washington to testify before the grand jury on November 6, 1927, a week after the mistrial, but since his conduct

then was and could not be the subject of any charge of contempt of court, it is unnecessary to refer to that part of the evidence. The introduction of this evidence, found for the most part in the testimony of McMullin, was strenuously objected to by the appellant, and over his objection received by the court. It should never have been introduced, and no doubt will not be considered by this court, except in passing upon the exception to its introduction duly noted by this appellant.

That is all of the testimony found in record which bears in any way upon the charge of contempt preferred against this appellant.

The following persons testified that this respondent was a man of the highest integrity and of excellent reputation: United States Senators Shortridge, of California (Rec. 739); Watson, of Indiana (Rec. 740); Copeland and Wagner, of New York (Rec. 741); Moses, of New Hampshire (Rec. 740); James M. Beck, Member of the House of Representatives, and former Solicitor General of the United States (Rec. 743), and Joseph P. Tumulty, former secretary to the late President Wilson (Rec. 742).

At the close of the Government's case a motion to discharge this appellant was seasonably made, but the trial court insisted upon the postponement of the consideration of the motion until the conclusion of the entire case (Rec. 698 and 699). At the end of the case the motion was renewed (Rec. 842). The trial court did not then pass on the motion, and did not dispose of it until requested so to do by this appellant's

counsel in the middle of the court's final decision, when he overruled the motion, and an exception was duly noted (Rec. 851).

The Court then proceeded to his findings of law and fact concerning charges against this appellant in the following language:

> "The Court: Now, on the question of the share taken by Mr. William J. Burns in this matter, it is one that has given me a great deal of—or, rather, I have given a great deal of consideration to it. I was very much inclined at first to the view that the evidence here would not justify holding Mr. William J. Burns in contempt of Court. I have followed very closely, or at least I have tried to do so, the very powerful argument made in his behalf by his counsel, Mr. Douglas, and also the argument of the prosecutors here on the subject. What we have really with regard to the evidence in this case is certain facts concerning Mr. W. J. Burns and the explanation of those facts by him, and such other evidence in his behalf as has been submitted here. It is that evidence, together with facts about which there is not any dispute in his behalf, and I will do no more than just briefly touch upon that evidence. I am not going to go over ground that has been traveled more than once by counsel on both sides here as to Mr. William J. Burns' connection with this Agency. As Mr. Douglas has very forcibly said, from the point of view of the contention he was making, of course Mr. William J. Burns was concerned about this matter. He was concerned about the Agency. As said by Mr. Douglas 'It was his child.' He was concerned about

the matter because his sons or at least one of them was involved in this charge.

"It is in evidence that he had for a very considerable time known the respondent Sinclair, that he had advised with him, and if I remember the testimony correctly, he had advised with him about matters coming within the purview of the Agency work at any rate, within a comparatively recent time. It is in evidence here that Mr. Sinclair was an old client of Mr. W. J. Burns. It is in evidence that, despite his restricted connection with the Agency, after he had retired finally from public office, that he did advise with his old clients.

"I am asked, in his behalf, to hold, to believe, that he knew absolutely nothing about the employment of this Agency in this surveillance until after the mistrial was declared. Here was his old client, an old client of his facing a criminal indictment against himself and another, in a case which had attracted countrywide attention. Here the respondent, Sinclair, comes to town in preparation, at least in part, for the trial which was to take place a week later, after his arrival. Here we have the employment by this Agency of 15 or 16 agents for the purpose of establishing this surveillance in that case after the jury is empaneled. Mr. William J. Burns, it is said, knows nothing whatsoever about it. Here he was in Washington, before the trial of the case commences, some twenty-four or thirty-six hours, and he knows nothing about the case and nothing about the surveillance and nothing about the matter of a surveillance that, in a week, less than a week from the time of Mr. Sinclair's arrival in town, was to

commence. I will not go over again the facts which have been discussed pro and con. It is perfectly true that Mr. Burns had denied that he was here. It is impossible for the Court to think that he was in entire ignorance of this matter. It taxes his credulity to do it.

"Mr. Burns' reputation has been testified to by those of high standing, by citizens of high standing, who had known him for periods ranging from 30 years, 25 years, 20 years to a shorter time. They all united in saying that his reputation, as they knew it, was that of a man of integrity and a good citizen. There is no evidence before the Court to the contrary, and, after all, I suppose it to be true that in a case like this there is a presumption of a person being a good citizen, even if he is charged with a criminal offense of some kind. Sometimes evidence of that character raises a doubt of the guilt of the person charged with a criminal offense. Taking the evidence in a case, and then taking reputation evidence, that reputation evidence has been known, in given cases, even to raise a reasonable doubt where none existed with reference to the other testimony against the defendant in the case. That Mr. William J. Burns should do what he could for the sake of his son, for the sake of the agency that he had founded—certainly that ought not to be held against him. The question is whether or not he took such a part in this matter, in the presentation of this affidavit to the Court, as subjects him to condemnation for his share in it. No answer has been given, no effective answer, it seems to me as to why that affidavit was delivered to the Court. There must have been

some motive, some purpose about it. It was not a futile, a useless act. I learn from the argument, or I am told in the argument of counsel in his behalf that he did not know anything about its delivery. Well, there is testimony to the effect that he stated very publicly to the newspaper men, gathered in this very building, that he filed such an affidavit. It has been stated, of course, that he did not know its falsity, that it was false, that clearly he did not know it was false. It is insisted by the Government that, under the circumstances and evidence in this case, that he did know it was false, knew it was false when it was placed in the hands of this Court. This is a charge of the most serious character, that this man who had enjoyed, apparently up to this time, a reputation for good citizenship, of being a man of integrity, that he should knowingly cause to be submitted to this Court that affidavit, seems almost past belief. That he knew of this surveillance under the testimony in this case, I cannot doubt. After all, the question maybe is whether or not mere knowledge of the surveillance by the agency is enough to require his being adjudged in contempt. There is no evidence that I recall, up to the time of the mistrial, that otherwise connects W. J. Burns with this matter. Of course I do not lose sight of the evidence that he is the founder of the Agency and has been the leading force in it until, he said, and others say in his behalf, that he drifted out of it when he entered the employment of the Government, and never resumed it except in a qualified capacity, but he did, in a qualified capacity enter its service as an advisor. I am told that he never vol-

unteered advice, that he only gave advice when it was solicited by his sons or by the Agency. I am not able to go that far, under this testimony, but I think the evidence shows—and it is not an unnatural situation; it is a most natural situation—the evidence points to Mr. W. J. Burns' interest in this Agency, whether it is the kind of legal interest we speak of—it was an interest, a vital interest, an interest which would more likely to a stronger interest than one that has for its basis some ownership of shares of stock. That he knew of this surveillance I cannot doubt, and that he knew it from the time it began. It is conceivable, I say again, from the time he knew, must have known, that when his client, the respondent Sinclair, was coming up for trial in this Court under a criminal indictment charging him, with another, with a very serious offense, that Mr. W. J. Burns knew about it. So while it cannot be said that his part in it is to the extent of his son Sherman Burns' part in it, much less that of the respondent Day or of the respondent Sinclair, I am obliged to find from this evidence that he was a party to that surveillance."

To the findings of law and facts this appellant duly noted an exception (Rec. 856).

The Court then imposed a sentence upon this appellant of imprisonment in the Washington Asylum and Jail for a period of fifteen days. (Rec. 859).

And thereafter an appeal in open court was noted from the judgment of the Court, and the bond on appeal duly fixed. (Rec. 860).

Points of Law Upon Which This Appellant Relies.

The respondent, William J. Burns, having appealed to the Court of Appeals of the District of Columbia from the final judgment entered in the above entitled cause, and the said cause having been certified to the Supreme Court of the United States, and the entire Record having been brought up, states that the points upon which he intends to rely in this court in this cause are as follows:

Point 1. The petition did not allege facts constituting contempt of court.

Point 2. There was no evidence adduced at the trial below upon which the findings of the court could be legally based.

Point 3. The trial court erred in admitting evidence of the operatives' reports.

Point 4. The trial court erred in not admitting testimony as to the intent of this appellant.

Point 5. The trial court erred in admitting evidence of things done after the mistrial of the Fall-Sinclair criminal case and when there was no cause on trial before the court.

Point 6. The trial court erred in not admitting evidence that there was no consciousness of the surveillance in the mind of any juror.

Point 7. The trial court erred in admitting evidence of acts of persons not shown to be connected with any of the appellants or with those acting in their behalf.

Point 8. The court erred in limiting the cross examination of Frank J. O'Reilly, a Government witness.

Point 9. There was no contempt of court committed by this appellant with respect to the preparation and filing of the McMullin affidavit.

Point 10. In view of the rulings and findings of the trial court, the court should have allowed the introduction of evidence concerning the practice and custom of the Department of Justice of the United States of shadowing juries in criminal cases.

Point 11. The trial court erred in admitting and considering testimony relating to the Kidwell-King-Akers incident, with which the appellants had nothing to do.

Point 12. The trial court erred in restricting the right of the appellants to discredit the Government's witness McMullin, both by limiting the cross examination of the witness and by rejecting testimony concerning his previous life and relating to his fraudulent acts.

Point 13. The findings of law and fact made by the trial court in the decision at the conclusion of the case are erroneous.

Point 14. There is no evidence in the entire record sufficient to prove that this appellant had any knowledge of or connection with the shadowing of the jury in the Fall-Sinclair criminal case.

Point 15. There is no evidence in the entire record sufficient to prove that this appellant had any knowledge of or connection with the procurement and submission of the false affidavit of William J. McMullin.

Point 16. There is no evidence in the entire record to support the judgment below.

Point 17. The trial court erred in admitting and refusing to strike out the evidence of William J. McMullin to the effect that Charles G. Ruddy had told him, McMullin, that the alleged false affidavit of McMullin had been made under the instruction of this appellant.

ARGUMENT.

The situation of this appellant is different from that of the others. The evidence conclusively demonstrates that, irrespective of whether or not the acts complained of in the petition constitute contempt of court, this appellant knew nothing of, and had nothing whatever to do with those acts. In making this statement, it is not to be considered for a moment that this appellant admits or concedes to the slightest extent whatever that the evidence adduced at the trial shows that any of the appellants were guilty of contempt of court, but, on the other hand, he emphatically states that the evidence is totally and fatally lacking of any such proof.

The points of law upon which this appellant relies are the same as those upon which the appellant, W. Sherman Burns relies, with this exception, namely,

that this appellant has stated four additional points not found in the points of law assigned by the appellant W. Sherman Burns. These additional points are as follows:

Point 14. *There is no evidence in the entire record sufficient to prove that this appellant had any knowledge of or connection with the shadowing of the jury in the Fall-Sinclair criminal case.*

Point 15. *There is no evidence in the entire record sufficient to prove that this appellant had any knowledge of or connection with the procurement and submission of the false affidavit of William J. McMullin.*

Point 16. *There is no evidence in the entire record to support the judgment below.*

Point 17. *The trial court erred in admitting and refusing to strike out the evidence of William J. McMullin to the effect that Charles G. Ruddy had told him, McMullin, that the alleged false affidavit of McMullin had been made under the instructions of this appellant.*

In so far as the main propositions of law involved in the consideration of this appeal are concerned, namely: those embraced in Points 1 to 13, inclusive, this appellant adopts, and, by reference, makes a part of this brief the Statement of the Case and the Argument in the brief of the appellant, W. Sherman Burns. The sole purpose of this brief is to discuss the propositions of law, stated in Points 14, 15, 16 and 17, to the effect that this appellant was in no way connected

with the shadowing of the jury in the criminal case against Albert B. Fall and Harry F. Sinclair; nor with the procurement and submission of the false affidavit of William J. McMullin.

Point XIV.

There is no Evidence in the Entire Record Sufficient to Prove that this Appellant had any Knowledge of or Connection with the Shadowing of the Jury in the Fall Sinclair Criminal Case.

The decision or finding of the trial court, which we have quoted in full in the Statement of the Case, is, in its essential parts, without any basis of fact. That is readily discerned from an analysis of the decision in the light of the Record.

As one reads the language of the trial Judge he is impressed with the fact that the question of the part played, or as the trial court expressed it "the share taken", by this appellant was a difficult one and hence of deep concern and doubt. Indeed, the trial Judge said that he "was very much inclined at first to the view that the evidence here would not justify holding Mr. William J. Burns in contempt of Court."

The trial court then indulged in a few general remarks about the argument of counsel and the evidence, and then observed that "of course Mr. William J. Burns was concerned about this matter. He was concerned about the Agency. As said by Mr. Douglas: 'It was his child.' He was concerned about the matter because his sons or at least one of his sons was

involved in this charge." All true, but what boots it. Certainly, this appellant, when he discovered that his son, Sherman, and the Agency, which he had founded and which still bore his name, were being accused of taking part in an attempt to corrupt a jury, was very much concerned, and naturally. But surely that does not in any way indicate guilt. It was an *ex post facto* interest and concern. All the evidence shows this.

We next come to the fact which seems to be the controlling one in the trial court's decision, namely, that Mr. Sinclair was an old client of W. J. Burns. Let us see what he says about it:

> "It is in evidence that he had for a very considerable time known the respondent Sinclair, that he had advised with him, and if I remember the testimony correctly, he had advised with him about matters coming within the purview of the Agency work at any rate, *within a comparatively recent time*. It is in evidence here that Mr. Sinclair was an old client of Mr. W. J. Burns. It is in evidence that, despite his restricted connection with the Agency, after he had retired finally from public office, that he did advise with his old clients."

The following is the testimony on which the foregoing statement was based. This appellant testified on cross-examination:

> "I have known Harry F. Sinclair a number of years and have done detective work for him for a number of years. The Agency was *not* employed by him in some capacity at the time the Fall-Sinclair case was being tried" (Rec. 752);

and on direct examination:

> "I was not consulted, and did no work in the Agency in 1927, that I remember" (Rec. 745).

W. Sherman Burns' testimony is:

> "I think my father is about 65 or 66 years old. After he had severed his connection with the Agency and after he had also severed his connection with the Government service and returned home, he occasionally would consult or advise with some of his old clients. I can't remember any specific case during that time where he actually employed the Agency to do the work required by one of the old clients, but if an old client had requested him he would have referred him to the Agency. For some period after he left the Government service he was ill and in Europe. I can't recall any specific instances right now of his employing the Agency for an old client during that period" (Rec. 786).

He had previously testified that he could remember only one investigation in which his father took part as advisor during the year 1927, and that was in the Spring of that year (Rec. 775).

It will be seen, therefore, that, while there was some justification for the finding that Mr. Sinclair had been a client of this appellant, there was no fact or facts to support the statement that Sinclair had advised with him "within a comparatively recent time," even if such a fact had been material. What difference did it make whether or not this appellant "within a comparatively recent time" advised with Mr. Sinclair, if it was

not shown that he advised with Mr. Sinclair or one of his associates about the particular matter of the surveillance of the jury?

The decision continues:

> "I am asked, in his behalf, to hold, to believe, that he knew absolutely nothing about the employment of this Agency in this surveillance until after the mistrial was declared. Here was his old client, an old client of his facing a criminal indictment against himself and another, in a case which had attracted countrywide attention. Here the respondent, Sinclair, comes to town in preparation, at least in part for the trial which was to take place a week later, after his arrival. Here we have the employment by this Agency of 15 or 16 agents for the purpose of establishing this surveillance in that case after the jury is empaneled. Mr. William J. Burns, it is said, knows nothing whatsoever about it. Here he was in Washington, before the trial of the case commences, some twenty-four or thirty-six hours, but he knows nothing about the case and nothing about the surveillance and nothing about the matter of a surveillance that in a week, less than a week from the time of Mr. Sinclair's arrival in town, was to commence. I will not go over again the facts which have been discussed pro and con. It is perfectly true that Mr. Burns had denied that he was here. It is impossible for the Court to think that he was in entire ignorance of this matter. It taxes his credulity to do it."

Mere guessing and speculation, without a scintilla of evidence to support it? Every word of testimony on the subject negatives any such suspicion. From the mouths

of the Government's own witnesses came the testimony that the employment was not made until October the 18th, 1927. This appellant was not in Washington "some twenty-four or thirty-six hours" before the Fall-Sinclair case commenced. He was here on October 13th, five days before the case began, when no one knew or could have supposed that the trial Judge would not lock up the jury in a case where its importance and the wealth and position of the defendant should have prompted him so to do, so as to allay any criticism or suspicion. But the most objectionable part of the decision just quoted is the suggestion that this appellant testified falsely concerning his presence here in Washington some days before the beginning of the trial of the criminal case. The trial court first makes the statement: "Here he (this appellant) was in Washington before the trial of the case commences, * * *", and then he says: "It is perfectly true Mr. Burns had denied that he was here." It is not true that Mr. Burns denied that he was in Washington before the criminal case began. There is no justification in the evidence for any such accusation, and in the light of the Record it is well nigh inconceivable that the trial court could have fallen into such error.

In the first place, as has been shown in the Statement of the case, this appellant's attorney freely admitted on the record that this appellant was in Washington on October 12 and 13, 1927. This appellant testified that he came to Washington on the night of October 12th to keep an appointment, theretofore made for the 13th with Mr. Dadswell of Sarasota, Florida, for a confer-

ence that day with Admiral Bullard of the Radio Commission, and of course no attempt whatever was made to conceal the fact of this appellant's presence in Washington. Mr. Dadswell took the stand, and testified that he met this appellant here in Washington on October 13th by appointment. And Miss Lois Stuntz, secretary to the late Admiral Bullard, of the Radio Commission, testified that said appellant was in Admiral Bullard's office on October 13th. Witnesses Dadswell and Stuntz were examined for appellant, not to prove that he was not in Washington, but to prove why he was here.

The court's charge that this appellant denied under oath that he was in Washington before the criminal trial commenced is particularly inexplicable in view of the fact that this appellant, in his sworn answer to the petition herein, stated that he was in Washington on October 12 and 13, 1927, as follows:

> "This respondent says that he was in the city of Washington on the 12th and 13th days of October, 1927, but that the reason for said visit and the business transacted by him were not in the remotest degree connected with the trial of the aforesaid cause of United States v. Sinclair *et al.* and he proposes to show on hearing hereof and upon information and belief he alleges that at the time of his said visit the said Burns Agency had not been employed to make a jury surveillance nor had the matter been considered, discussed or mentioned to any officer or employee of the said Burns Agency, nor, (and this he avers of his own knowledge) to this respondent." (Rec. 20).

The trial court then comments upon the testimony concerning the integrity and good character of the appellant, and observed, in passing, that such testimony raised a presumption of innocence. It ended with the observation.

Speaking further of this appellant the trial court said:

> "That he knew of this surveillance under the testimony in this case I cannot doubt."

Search the Record, from beginning to end, but there will be found no fact upon which such a finding can be based. There is no such evidence. All the testimony on this subject, whether introduced by the Government or by the appellants, is quite to the contrary.

The trial judge is frank to admit that:

> "After all, the question *maybe* is whether or not *mere knowledge* of the surveillance by the agency is enough to require his being adjudged in contempt. There is no evidence that I recall, up to the time of the mistrial that *otherwise* connects W. J. Burns with this matter."

In other words, the trial court in effect said that knowledge, or "mere knowledge," as he puts it, of the existence of the shadowing was the only connection this appellant had with the surveillance of the jury in the criminal case!

As we have heretofore shown, there was *no* evidence of any knowledge of the surveillance on the part of this appellant. Assuming, however, for argument's sake, that the appellant did know of the surveillance,

how could that fact support an adjudication of contempt? We have searched the decisions and are unable to find a single case to support the proposition that *knowledge* of the act or fact that constitutes contempt of court would render the person having such knowledge also guilty of such contempt.

The trial court then proceeded to discuss what effect mere knowledge of the surveillance had on the question of contempt of court.

> "Of course I do not lose sight of the evidence that he is the founder of the Agency and has been the leading force in it until, he said, and others say in his behalf, that he drifted out of it when he entered the employment of the Government, and never resumed it except in a qualified capacity, but he did, in a qualified capacity enter its service as an advisor. I am told that he never volunteered advice, that he only gave advice when it was solicited by his sons or by the Agency. I am not able to go that far, under this testimony, but I think the evidence shows—and it is not an unnatural situation; it is a most natural situation—the evidence points to Mr. W. J. Burns' interest in this Agency, whether it is the kind of legal interest we speak of—it was an interest, a vital interest, an interest which would more likely be a stronger interest than one that has for its basis some ownership of shares of stock. That he knew of this surveillance I cannot doubt, and that he knew it from the time it began. It is conceivable, I say again, from the time he knew, must have known, that when his client, the respondent Sinclair, was coming up for trial in this Court under a

> criminal indictment charging him, with another, with a very serious offense, that Mr. W. J. Burns knew about it. So while it cannot be said that his part in it is to the extent of his son Sherman Burns' part in it, much less than that of the respondent Day or of the respondent Sinclair, I am obliged to find from this evidence that he was a party to that surveillance."

We have no quarrel with the trial court's general comment of the relation between William J. Burns and the Burns Agency, but we do take issue with him when he says:

> "I am told that he never volunteered advice, that he only gave advice when it was solicited by his sons or by the Agency. I am not able to go that far under this testimony."

Who so informed the court? The Government's own witness, Raymond J. Burns, who testified:

> "Since I have been president, and since W. J. Burns' salary as adviser of the Agency commenced, he has not done anything whatever in connection with the Agency, even in the shape of advice, unless his advice was sought either by me or my brother, W. Sherman Burns. His advice was not sought in connection with this particular employment, the shadowing the jury in the Fall Sinclair case." (Rec. 672).

The only two other persons who could testify to this, namely, W. Sherman Burns and this appellant, testified to exactly the same fact. There is no evidence to the contrary. Why then did the trial court have such

difficulty in going, as he says "that far?" The evidence went that far.

We find this statement: "That he *knew* of this surveillance I cannot doubt, and that he knew of it from the time it began." Again we say even if knowledge were sufficient, there is no evidence of that. "It is conceivable * * *," said the trial court, speaking of the criminal case, "that Mr. W. J. Burns knew about it." It is difficult to tell whether the trial court referred to the criminal case or to the surveillance, but assuming he meant the latter, we agree with him that it was *conceivable* that he knew of it, but when a person is charged with an offense in the nature of a crime, he cannot be convicted on what the imagination might conceive. If we understand the law, the trier of the facts must be convinced beyond a reasonable doubt that the accused is guilty.

Then the trial court holds that by reason of his knowledge of the surveillance, this appellant was a party thereto, "but not to the extent of his son, Sherman Burns." When it is realized that the only connection of Sherman Burns was his acceptance of the employment on behalf of his corporate principal, the Burns Agency, it is difficult to understand what the trial court meant, unless it was, as he had repeatedly said before, that this appellant, by reason of "mere knowledge" was a party thereto. His connection could not be anything else, and be less than the part that his son, Sherman, had in the shadowing; all of which goes to show that this appellant could not have talked with Mr. Sinclair in Washington about the shadowing, as the court suggested, because if he had, then his part

therein would have been to a greater extent than that of his son Sherman.

Point XV.

There is no Evidence in the Entire Record Sufficient to Prove that this Appellant had any Knowledge of or Connection with the Procuring and Submission of the False Affidavit of William J. McMullin.

It is not the purpose of this portion of our argument to discuss the proposition that, even if the affidavit had been filed by this appellant with knowledge of its falsity, he could not legally be adjudged in contempt of court because there was nothing before the court, but this appellant, by reference, adopts the argument of that proposition made in the brief of the appellant W. Sherman Burns.

We propose here to show that this appellant had nothing to do with procurement and submission of the McMullin affidavit, and hence, the charge in that respect must fail for want of proof.

We return to that part of the trial court's decision which relates to the submission of the false affidavit. It will be noted that the trial court does not find that he had any share in procurement. This is what the trial court decided:

> "The question is whether or not he took such a part in this matter, in the presentation of this affidavit to the Court, as subjects him to condemnation for his share in it. No answer has been given, no effective answer, it seems to me as to why that affidavit was delivered to the

> Court. There must have been some motive, some purpose about it. It was not a futile, a useless act. I learnt from the argument or I am told in the argument of counsel in his behalf that he did not know anything about its delivery. Well, there is testimony to the effect that he stated very publicly to the newspaper men, gathered in this very building, that he filed such an affidavit. It has been stated, of course, that he did not know its falsity, that it was false, that clearly he did not know it was false. It is insisted by the Government that, under the circumstances and evidence in this case, that he did know it was false, knew it was false when it was placed in the hands of this Court. That is a charge of the most serious character, that this man who had enjoyed, apparently up to this time, a reputation for good citizenship, of being a man of integrity, that he should knowingly cause to be submitted to this Court that affidavit, seems almost past belief."

What seems to impress the trial court was the fact, as he said, that no answer had been given "why that affidavit was delivered to the court." The trial court evidently overlooked the testimony of Mr. Lodge to the effect that he, a member of the Bar, brought the matter to the trial court's attention for the trial court's information—to make such use of it as he saw fit.

There is no definite fining that this appellant took part in the filing, or submission of the affidavit, although the trial court does refer to testimony which he considers apparently persuasive of the fact that this appellant submitted the affidavit. The trial court refers to the testimony of the two newspaper men, who both

were very careful to say that the appellant had said that he had "*filed*" the affidavit. This testimony is valueless, because Justice Siddons, himself, filed the affidavit, and was very emphatic in stating in open court that he had done so (Rec. 1, Addition). But assuming that the trial court did find that this appellant had submitted or caused to be submitted the McMullin affidavit, then we say that the finding is without any evidence to support it. Every person connected with making of the affidavit, except McMullin, exonerates this appellant of any connection with the making or filing of the affidavit. McMullin was permitted, over the objection of this appellant, to testify that Ruddy told him, McMullin, that William J. Burns told Ruddy to procure the making of the false affidavit. That evidence was pure hearsay, and its admission is the subject of discussion in a subsequent portion of this brief, and further comment upon it will be reserved until this later discussion.

The trial court then takes up the matter of the appellant's knowledge of the falsity, but it is quite difficult to determine just what the trial court was attempting to decide. It is unfortunate that the trial court is so vague. After stating the contention of both sides as to this appellant's knowledge, or lack of knowledge of the falsity of the appellant, the trial court leaves off further discussion with the observation: "that he should knowingly cause to be submitted to this court that affidavit, seems almost past belief."

We submit that, if the trial court made any finding, it was that this appellant did not know of the falsity of

the affidavit. At any rate, the trial court certainly *did not* find that this appellant knew of the falsity of the affidavit. If he had made such a finding it would have been wholly unsupported by any fact whatsoever, for the reason that all the evidence conclusively shows that this appellant knew nothing about the procurement and submission of the affidavit, and did not hear of it until November 5, 1927, two days after it was made, and the day after it was handed to Justice Siddons.

Point XVI.

There is no Evidence in the Entire Record to Support the Judgment Below.

What has been said about the trial court's findings as expressed in the decision is equally true with respect of the ultimate judgment; that is to say, there is no evidence in the Record to support the judgment.

We are not unmindful that the Court of Appeals of the District of Columbia has repeatedly held that a finding of fact by a trial judge is entitled to the same consideration as a verdict of a jury, if there is any evidence to support it or if it is not clearly and manifestly wrong, or if it is not against the overwhelming weight of the evidence.

McLarren vs. McLarren, 45 App. D. C., 237.
Ellison vs. Splain, 49 App. D. C., 99.

However, as was said by Mr. Justice Van Orsdel, in *May Jik vs. United States*, 47 App. D. C., 498, 504:

> "The right to look into the evidence to test its sufficiency to support a judgment is always within the discretion of an appellate court."

Indeed, it has been held by the Court of Appeals of the District of Columbia, that even where a trial judge's findings is supported by evidence, nevertheless, if the fact found is so improbable or so contrary to the weight of the evidence, such finding will not be followed by the Court of Appeals. *Eichelberger vs. Symons*, 51 App. D. C., 69. In that case the lower court found that Mrs. Symons was *innocent of adultery*, but the Court of Appeals reversed the lower court and held that the evidence showed conclusively that the defendant and the corespondent were *guilty* of adultery. The same rule should, for greater reason, be applied here, where the court below has found a citizen guilty of a charge without any evidence whatever to support the finding and especially in a case where, before he can be adjudged in contempt, he must be found guilty beyond any reasonable doubt.

Grompers vs. Buck's Stove and Range Co., 221 U. S., 418.

Lombardo vs. United States, 56 W. L. R., 833 (Decided November 5, 1928).

Point XVII.

The Trial Court Erred in Admitting and Refusing to Strike out the Evidence of William J. McMullin to the Effect that Charles G. Ruddy had told him, McMullin, that the Alleged False Affidavit of McMullin had been made under the Instructions of this Appellant.

Every witness in the trial below, except McMullin, testified that William J. Burns had nothing to do with, and had no knowledge of the alleged false affidavit executed by McMullin. Over the objection of this appellant, the trial court permitted McMullin, when on the witness stand, to state that Ruddy, the manager of the Burns Agency, told him, McMullin, that William J. Burns told him, Ruddy, to have the affidavit prepared and executed. Exceptions to the admission of the testimony were duly noted (Rec. 623).

Both Ruddy and this appellant positively denied the truth of McMullin's statement, so that the foregoing hearsay testimony is the only basis in the entire record for the court's ruling that this appellant was in any manner whatsoever connected with the surveillance. If that testimony was improperly admitted and considered, as we respectfully submit it was, the whole case against this appellant must fall. The trial court must have considered the hearsay testimony of McMullin, or else he would not have admitted it over the objection of this appellant, and he would have granted the motion made by this appellant at the close of the Government's case to strike out the testimony (Rec.

697) and, certainly, would have granted the motion when renewed at the close of the entire case (Rec. 841). Were it not for these facts, we would not waste space and the time of this court in a discussion of the rule of pure hearsay evidence. That such evidence is inadmissible has been repeatedly held by this court.

Conrad *vs.* Atlantic Inc. Co., 1 Pet., 386.
Murphy *vs.* Killinger, 8 Wall., 480.
Young *vs.* Godbe, 15 Wall., 562.
Hopt *vs.* Utah, 110 U. S., 574.
Cook *vs.* United States, 138 U. S., 157, 158.
Cadwalader *vs.* Zeh, 151 U. S., 171.

Nor could the evidence possibly be admitted on any theory of agency. It is axiomatic that the fact of agency cannot be proved by the declaration of the alleged agent.

Conclusion.

The Government's brief will follow the filing of this. Surely, if we have not correctly recited the evidence, or have left out of our Statment of the Case any testimony bearing upon the guilt or innocence of this appellant; or if we are in error when we emphatically state that there is no evidence to support the adjudication herein, counsel for the Government will supply the missing testimony, or will point out why the evidence justifies the ruling. We await with interest to see just what will be said by our opponents. As far as has been in our power we have searched the Record to find any piece of evidence, small as it might be,

upon which the court below could possibly base the adjudication. We have found none. There is none.

It is submitted that if this appellant had been summoned and directed under the solemn and compelling force of law to prove his innocence beyond a reasonable doubt, he would have discharged that obligation.

Respectfully submitted,

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FREDERICK C. BRYAN.

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Office Supreme Court, U. S.
FILED
MAR 29 1929
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 748

HARRY F. SINCLAIR, HENRY MASON DAY, WILLIAM J. BURNS, AND W. SHERMAN BURNS, APPELLANTS,

vs.

UNITED STATES, APPELLEE.

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF THE APPELLANT W. SHERMAN BURNS UPON THE ENTIRE RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 748

HARRY F. SINCLAIR, HENRY MASON DAY, WILLIAM J. BURNS, AND W. SHERMAN BURNS, APPELLANTS,

vs.

UNITED STATES, APPELLEE.

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF THE APPELLANT W. SHERMAN BURNS UPON THE ENTIRE RECORD.

Statement of the Case.

I.

NATURE OF THE PROCEEDINGS.

This case is before the Supreme Court of the United States upon certification to it by the Court of Appeals

of the District of Columbia of certain questions of law. After motion was made by the Government counsel, which was joined in by counsel for the appellants, this court made and entered the following order:

> "*In Consideration* of the motion to bring up the entire record and cause herein and advance the case for argument on Monday, April 22, next,
>
> "*It is now here ordered* that the said motion be, and the same is hereby granted."

This appellant was one of the respondents below in a criminal contempt proceeding. He appeals from the findings of law and fact of the trial justice adjudging him guilty of contempt of court and from an imposition of a fine of $1,000 (Rec. 858).

The appellant is the Secretary and Treasurer of the William J. Burns International Detective Agency, Inc. (hereinafter for convenience called the "Burns Agency"), and in such capacity, at the instance of the appellants Harry F. Sinclair and Henry Mason Day, undertook the work of observing, or as it is commonly called shadowing, the jurors in the case of United States *vs.* Harry F. Sinclair and Albert B. Fall, criminal No. 43,324, then being tried in the Supreme Court of the District of Columbia before Hon. Frederick L. Siddons, Associate Justice. A mistrial was declared in the criminal case against Sinclair and Fall, and it was claimed that the activities of the operatives or investigators of the Burns Agency, among other things, was the cause of such mistrial (Rec. 2-3). Shortly thereafter this appellant, with five other respondents,

was served with a petition alleging that he, with the other respondents, was guilty of criminal contempt of court (Rec. 2); and he was directed to appear on December 5, 1927, before Justice Siddons and show cause why he should not be adjudged in contempt of the authority of the court (Rec. 8).

In substance, the petition alleged that at the October, 1927, term of the Supreme Court of the District of Columbia, in the criminal division thereof, there came up for trial the case of United States *vs.* Sinclair and Fall, wherein those defendants were charged with conspiracy to defraud the United States; that the trial was begun before Justice Siddons on October 17, 1927, and that on the next day twelve petit jurors were empanelled; that the jury was respited from day to day until November 2, 1927, when the jury was finally discharged and a mistrial declared, because sworn charges had been made against Edward J. Kidwell, Jr., one of the jurors, to the effect that during the trial and outside the court room he had made remarks in the presence and hearing of J. Ray Akers and Donald K. King concerning his attitude and intended action as a juror with respect to the trial of the criminal case; and because of sworn charges that there were a large number of operatives or investigators of the Burns Agency in Washington since October 18, 1927, in a "close, intimate, objectionable and improper surveillance and investigation of the jurors aforesaid and their relatives, neighbors and friends of said jurors." It was further alleged that the appellant Harry F. Sinclair directed the appellant Henry Mason Day and one Sheldon Clark, his associates, to come to Wash-

ington and engage the services of the Burns Agency, and to supervise the activities of and receive the reports from the operatives of that agency for the following objects:

> "To spy upon said jurors and each of them, to bribe, intimidate and influence said jurors and each of them, and to do anything calculated to interfere with and impede said jurors and each of them in the unbiased discharge of their duties in the trial of said cause and to influence, pervert, impede and prevent said jurors in the discharge of their duties as jurors, and to impede, pervert and prevent the due administration of justice in said court in the trial of said criminal prosecution, either by corruptly influencing said jurors to decide the issues of said prosecution in favor of the defendants therein, or to disagree as to said issues, by unlawfully spying upon the said jurors and each of them for the purpose of concocting false charges against one or more of the said jurors, in case such a course should seem advantageous to said defendants in said cause, with a view of bringing about a mistrial of the cause aforesaid; or otherwise accomplish such purpose."

(Rec. 3, 4). The petition stated also that the employment of the Burns Agency was accomplished by a telephonic communication with this appellant on October 18, 1927, and on that day and the following day fifteen operatives of the Burns Agency were assembled in Washington and were assigned by the appellant Day and Clark to the duties of spying upon, investigating and shadowing the jurors, and that such duties were

performed by the operatives up to and including November 2, 1927; that in the early morning of October 19, 1927, Charles G. Ruddy, then in charge of the operatives of the Burns Agency, went to Baltimore and conferred with Charles S. Veitsch (one of the respondents below who was discharged at the termination of the trial), the manager of the Baltimore office of the Burns Agency, in connection with the conduct of the investigation; that thereafter on three separate occasions Veitsch came to Washington and brought large sums of money, totalling $1,500, which he delivered to Ruddy to finance the preliminary steps of the investigation; that William J. Burns, while not an officer of the Burns Agency, was actively engaged in conducting its affairs, and, through the holding by his wife of 47 out of the total 50 shares of its capital stock, indirectly received moneys and benefits, and that he came to Washington on October 12 and 13, 1927, in connection with the investigation, and on the 3rd of November returned to Washington, where he and this appellant "in furtherance of said designs of said respondents, procured the making of a false affidavit purporting to show that a representative of the United States Department of Justice approached and held conversation with said Norman L. Glasscock, a juror in said cause, as aforesaid, and that the said William J. Burns and the said W. Sherman Burns, knowing said affidavit to be false and without truth and fact, did then and there procure the submission of said affidavit to said Hon. Frederick L. Siddons, Associate Justice of the Supreme Court of the District of Columbia, intend-

ing thereby to provide evidence, such as it was, that the United States of America, through one of its employees, had tampered with said juror in the case of United States *vs.* Harry F. Sinclair and Albert B. Fall, Criminal No. 4324."

The petition still further alleged that Ruddy, in charge of the investigation, directed an investigation of the encumbrances upon the home of John P. Kern, one of the jurors, and an investigation of his neighbors, and of the brother of Edward J. Kidwell, Jr., a juror; and that the operatives, at the direction of Ruddy, falsely reported that juror Glasscock was seen in conference with an employee of the Department of Justice at a remote place outside of Washington; and that all of the operatives reported daily in writing to Ruddy, the original of which reports were sent to this appellant in New York; and that "at all times hereinbefore mentioned, each of the persons above named as respondents to this petition well knew all of the premises aforesaid, and well knew that the said criminal prosecution was being conducted in said court as aforesaid; that said prosecution was not finished, that said jurors were sworn jurors trying the issues in said cause in said court as aforesaid; that they, the said respondents, were not, as in fact they were not, called upon or authorized by said court, or by anybody in authority, to spy upon said jurors or any of them, or to approach, molest, intimidate, or influence said jurors or any of them, or to do anything calculated to interfere with or impede said jurors or any of them in the unbiased discharge of their said duties, or to in-

fluence, pervert, prevent, or in any manner, or to any extent, impede the due administration of justice in said court in the trial of said criminal prosecution, either by corruptly influencing said jurors to decide the issues of said prosecution in favor of the respondents therein or to disagree as to said issues by unlawfully spying upon said jurors or any of them for the purpose of concocting false charges against one or more of said jurors, in case such a course should seem advantageous to said defendants in said cause, with a view of bringing about a mistrial of the cause aforesaid" (Rec. 2-7).

This appellant filed his answer and denied the material allegations of the petition, except the fact of employment, and denied any design on his part, or any knowledge of any design on the part of any other person, to establish contact with any juror for the purposes alleged in the petition; and denied that he and William J. Burns, or he alone, or with any other person procured the making of a false affidavit; and he further stated that he believed no contact, direct or indirect, was established between any operative and any juror, and that the administration of justice was in no way impeded; and further that he knew nothing of the investigation concerning the encumbrances on the home of juror Kern. Moreover, his answer stated that the right to investigate or shadow a jury empanelled in a cause was a right within the letter and the spirit of the law, and further that the facts alleged in the petition were insufficient in law to constitute a criminal contempt (Rec. 22).

The answer was accompanied by a motion to discharge the rule and dismiss the petition on the ground that the petition was duplicitous and multifarious; and that the facts alleged in said petition, even if fully established, did not constitute a contempt of court, criminal or otherwise, and that the court was without jurisdiction in the premises. This motion was overruled and an exception duly noted (Rec. 76). At the close of the Government's testimony the motion was renewed on the same grounds, and for the further reason, that none of the allegations of the petition respecting the purposes and designs of this appellant were in any wise supported by the evidence, and further that there was not a scintilla of evidence that any person, connected in any wise with the respondents, ever approached, came in contact with or conversed with a juror, or ever attempted so to do, or that any juror was ever conscious of being investigated or shadowed; and that no act of the respondents obstructed or directly tended to obstruct the administration of justice. In addition to the foregoing grounds, the motion of this appellant to dismiss the petition at the close of the Government's case was based upon the fact that the petition charged the respondents with a *conspiracy* to commit a criminal contempt; and that shadowing or investigating a jury was not in itself a violation of law and not contempt of court; and that the submission of the McMullin affidavit could not constitute contempt of court, since there was no trial then pending and nothing was asked to be done with the affidavit; and on the further ground that the prosecution was

based upon Section 135 of the penal code. The motion was overruled and an exception duly noted (Rec. 698).

At the close of the respondents case and after argument by respective counsel, the court rendered its opinion and adjudged this appellant guilty of criminal contempt of court, and imposed upon him a fine of $1,000 (Rec. 858).

The facts disclosed by the admitted pleadings and by the evidence are substantially the following:

II.

Concerning the Employment of the Burns Agency.

On October 18, 1927, there was empanelled in the Supreme Court of the District of Columbia, criminal division No. 2, before Justice Siddons, a jury to try the issues in the case of United States *vs.* Sinclair and Fall, a criminal proceeding (Rec. 2). The jurors were not kept locked up, but were allowed to go to their homes at the end of each trial day. On the afternoon of the first day of the trial the appellant Sinclair stated to the appellant Day that he was disappointed that the jury had not been locked up, and was fearful that someone of his enemies or competitors, or those who had written him so many malicious letters, might in some way influence, or attempt to influence the jury. He told Day that he wanted from 12 to 14 investigators or operatives, with someone in charge, sent to Washington by the Burns Agency to investigate or shadow the jury. His idea was that they would merely keep the jury under surveillance and not approach them

or speak to them or in any way come in contact with them—simply to observe and to report any suspicious acts of the jurors or those coming in contact with them, and to inform Mr. Sinclair of such persons who might come in contact with any of the jurors (Rec. 823). Day communicated with one Jeffries, the personal secretary of Mr. Sinclair in New York, and instructed Jeffries to have someone in the Burns Agency call him, Day, on the telephone (Rec. 824). Mr. Jeffries communicated with this appellant at the Burns Agency, and requested him to call Day on the telephone in Washington (Rec. 398). As requested, this appellant then telephoned Day, who told the appellant that the jury in the criminal case had not been locked up and that he would like to have the jury covered or shadowed as they wanted to have a "square deal." Day said he wanted twelve men to cover the jury and made an appointment to meet the man who would be in charge of the operatives at nine o'clock that evening in Washington (Rec. 796). This appellant selected Ruddy, then manager of the Philadelphia office of the Burns Agency, to take charge of the surveillance, because he had confidence in Ruddy's ability and judgment. He called Ruddy on the telephone and asked him if he could take charge of the work, at the same time telling him that it was a pure surveillance case; and telling him where he could meet Day that evening (Rec. 776, 777). This appellant moreover told him that he could take instructions from Day, but that after he had talked with Day he should call this appellant on the telephone, so that this appellant could

be certain that he was correct in his assumption of what was the character and the limitations of the work (Rec. 777). It was this appellant's purpose to consider what instructions Ruddy should receive from Day and determine for himself whether or not it was within the scope of what this appellant was willing to do (Rec. 777). Ruddy arrived in Washington that same evening about half past ten and met Day at 2118 Leroy Place. After identifying himself by using the prearranged name of Jeffries so that Day would know who he was (Rec. 825), Day gave Ruddy Exhibit No. 1, a descriptive list of the jurors (Rec. 78, 79). Upon inquiry Ruddy told Day that there would be at least eight operatives in the field by eight o'clock next morning. Day then told Ruddy that he wanted him to place each of the jurors under surveillance and that the jurors were to be investigated as closely as possible outside of the court, but that under no circumstances were any of the operatives to approach any juror; and further that he particularly desired to be informed whether any of the jurors should be approached by anyone else; and to be careful to obtain the numbers of any of the automobiles other than those of the jurors in which the jurors might ride; and he emphasized the necessity of care so that the jurors would not be approached at any time or in any way (Rec. 83, 825, 826). Day repeated the instructions that had been given him with reference to this (Rec. 776, 777). Day also said that he wanted daily reports of the investigation (Rec. 85, 826).

About midnight Ruddy went to Baltimore and con-

ferred with Veitsch, manager of the Baltimore office of the Burns Agency. He then called this appellant on the telephone and repeated to him the conversation that he had with Day and told him what Day wanted done. This appellant then told Ruddy to be certain to see that the men were very careful and to see that the men were instructed not to embarrass the jurors in any way, or to permit the jurors to know that they were being shadowed; and if any man disobeyed such instructions he was to be immediately sent back to his respective office. This appellant had already instructed the men who had left the New York office to take part in the work of investigation along these same lines (Rec. 84).

III.

The Activities of Operatives.

The actual work of shadowing the jury began on Wednesday, October 19, 1927. Eight operatives who had arrived that morning from New York, Philadelphia and Baltimore were given their instructions by Ruddy and assigned to cover various jurors. Three more operatives arrived later in the day, but too late to be put to work. The credentials and identification cards of all of the operatives were taken from them, as is the established custom of the detective business. Ruddy testified regarding this:

> "At the very beginning of the operation the identification cards of the men were taken from them. It is very, very often done in surveillance work, and more for this reason, so when

> they are off the job around the hotels they won't be identified by anything on them, or that they might leave in their room. We certainly cannot put a uniform on our men and do shadow work, and we took the precautionary measure to take up surveillance cards, and we do it constantly" (Rec. 384).

And each operative was known by a symbol instead of his name, and used his symbol in signing his reports, as is also the established custom of detective agencies (Rec. 480).

Of the eight operatives who began in the morning, only three were successful in locating those jurors whom they were instructed to cover, called in the profession "their subjects." Jurors Heaton, Bailey and Holmes were the only ones shadowed.

On October 20th ten jurors were shadowed; juror Costinett was missed by the operatives assigned to him; and juror Flora was not shadowed at all. Juror Kidwell was followed to the Museum grounds by operative Stewart. It was the intention to put every juror under surveillance, but to do so required more men than were available (Rec. 386).

On October 21st ten jurors again were shadowed. Only one was missed and one not covered at all. Moreover, four of the operatives were shifted from one juror to another as a precautionary measure to avoid any suspicion on the part of the jurors that they were being followed. One more operative arrived that day. In the evening all of the operatives met at the Mayflower Hotel in operative O'Reilly's room where their original instructions were reiterated, namely,

that they should be very, very careful so as not to permit the jurors to know that they were being shadowed (Rec. 379). These instructions had been theretofore given to every man by Ruddy on the morning of October 19th before they had begun their work of investigation, and as others arrived to take up the work the same instructions were given them; and the operatives were repeatedly told to be careful to observe them. Ruddy moreover told the operatives that they would be sent back to their respective offices and recommended for dismissal if they violated the instructions (Rec. 379). The purpose of this meeting was to emphasize the previous instructions, and to change men from one juror to another. That was arranged at the meeting (Rec. 381). Nothing, however, was said or done by anyone of the operatives that impelled or suggested Ruddy to reiterate the instructions. He merely did it as a precautionary step (Rec. 384). It was on this day that Ruddy was directed by Day to place juror Kern's brother under surveillance (Rec. 375).

On October 22nd seven jurors only were shadowed. One operative left, one was assigned to shadow and investigate Charles E. Burr, who had been reported by operative McMullin as having been with one of the jurors. The operative, however, did not succeed in locating Burr on that day. Three operatives worked together in shadowing juror Kern with a hope of being able to locate and shadow Kern's brother-in-law. They were, however, unsuccessful in that. Late that evening four of the operatives paid a social visit to

operative O'Reilly at his rooms in the Mayflower Hotel.

On October 23rd six jurors, Grenfell, Kidwell, Kern, Goucher, Holt and Herzog were shadowed. Two operatives shadowed Goucher because he lived in the suburbs where it was difficult to observe him without being seen. Operative Steer was, at the direction of Ruddy, assigned by O'Reilly, who was in a way the lieutenant of Ruddy, to investigate a man named Vogts. Steer received only general information from the neighbors of Vogts. Two operatives worked together in shadowing juror Kern. Operative Sullivan continued to investigate Burr, but he failed to find out anything about him.

On the next day, October 24th, the same six jurors were again shadowed by the same operatives, except that only one operative kept juror Goucher under surveillance. Operative Sullivan again failed to find out anything about Burr. Operative Steer was assigned to investigate one Horace R. Lamb, who had been reported by operative McMullin as having been conversant in an out of the way place with juror Herzog. While operative Steer did look up Lamb in the city directory, he did not succeed in seeing him. Operative Brennan was assigned by O'Reilly to investigate one Josephine E. Hopkins, which was done. Operative Klein kept juror Kidwell under surveillance to the Museum grounds, where the juror ate his lunch crouched against a tree. No one, certainly not Klein, the operative, approached juror Kidwell while he was there.

It was on the same day, October 24th, that O'Reilly at the direction of Ruddy, went to Anacostia to get a

description of a barber named Kidwell, so as to be able to identify him, if necessary, at a later date. Ruddy had told O'Reilly that the barber was a brother of juror Kidwell, but did not tell him where the barber lived. He did, however, tell him to begin his investigation in Anacostia (Rec. 415). *O'Reilly was not asked or directed by Ruddy to locate, see or get in contact with juror Kidwell, nor did he attempt to do so or try to find out anything whatsoever about juror Kidwell when he went to Anacostia.* O'Reilly had never been there before (Rec. 428). He asked five or six people on the street where a barber, named Kidwell, lived; and he was directed by someone to U Street. He found the street number from a list of "Kidwells" he had taken from the city directory. He did not know the full name nor the initials of juror Kidwell (Rec. 429). He did not go into the house, but rang the door bell and an elderly lady came to the door (Rec. 429). He asked if Mr. Kidwell was in and she in turn asked which Mr. Kidwell. He replied, "Mr. Kidwell, the barber," and he was then told that the man he wished to see was at his barber shop in the Myrtle Apartments in Congress Heights (Rec. 506). O'Reilly did not say who he was except that he was from the Health Department with some papers (to allay suspicion). O'Reilly then left (Rec. 507), and went to the Myrtle Apartments and found Kidwell, the barber, in his shop. He did not go into the barber shop (Rec. 430). He asked Mr. Kidwell if a Mr. Stewart ran a barber shop in Congress Heights (a name taken at random), and was told that a Mrs. Stewart had formerly run a beauty parlor there but

had moved away. O'Reilly thanked him. That was all that was said (Rec. 509). O'Reilly then returned to Wardman Park Hotel (the headquarters of the Burns Agency in this particular work), and reported to Ruddy what had occurred. Day was there at the time (Rec. 416). *When O'Reilly went to the house in Anacostia he did not know where juror Kidwell lived, and he made no inquiries there about him* (Rec. 430). O'Reilly never shadowed any of the members of the Kidwell family (Rec. 432).

On October 25th seven operatives left Washington and returned to their respective offices. Operative Merritt shadowed juror Kidwell; operative Steer shadowed Burr; operative Sullivan tried, but failed to obtain any information concerning Burr; and O'Reilly tried to get a description of Lamb, but failed.

On October 26th O'Reilly, from a description of Lamb made by Ruddy from operative McMullin's report, was able to locate Lamb and shadow him. Ruddy joined him in this work for several hours during the day, and operative Merritt joined him in the evening. Merritt shadowed juror Kidwell until 6:30 and joined O'Reilly at eight. Operative Steer shadowed Burr, and operative Sullivan returned to his home office.

On October 27th Merritt shadowed juror Kidwell; Steer shadowed Burr, while O'Reilly failed to locate Lamb.

On October 28th Merritt, in conjunction with operative McMullin, shadowed Glasscock; Steer shadowed Burr; and O'Reilly made a credit investigation of juror Kern to determine his financial responsibility,

but he learned nothing (Rec. 421). Ruddy had been asked by Day for the best way to find out how responsible juror Kern was, as he believed him irresponsible. Ruddy replied that a general credit check on the man was the best way and then directed O'Reilly to make a credit report (Rec. 87). This report was never reduced to a typewritten report to be handed to Day and was never reported to him personally; nor was this report ever sent to this appellant in New York, as Ruddy had doubts as to whether or not the investigation was in violation of the instructions given to him by this appellant, and beyond the scope of the work (Rec. 206).

On October 29th jurors Glasscock and Burr were the only ones under surveillance. There were no other operations that day. The same was true on October 30th. The next day, October 31st, was the day the apartment of Ruddy was raided by Secret Service men, and, of course, the activities of all the operatives were ended.

The activities of the Burns operative McMullin have not been discussed under this subheading, but will be treated separately for reasons that will hereafter appear.

During the first week of the criminal case against Sinclair and Fall, an independent investigation was made by Day through the office of Randall Hagner & Company as to whether or not there were any incumbrances on the home of Juror Kern. This was not conducted through the Burns Agency, nor did this appellant or any of the operatives know that it was being done (Rec. 388 to 397).

IV.

The Effect of the Surveillance on the Jurors.

The Government strenuously attempted to show that there was contact between the Burns operatives and the jurors, but failed. It was then contended that the jurors were conscious that they were being shadowed. The evidence itself, however, successfully demolishes both contentions.

That the Record amply supports this statement is best shown by quoting the words of the Court of Appeals of the District of Columbia in its statement of the record in its certification of questions to this court. The Court of Appeals there said:

> "*The evidence does not disclose that any of the operatives were instructed to approach or approached a juror, nor does it disclose that any juror knew that he was being shadowed.*"

Eight jurors took the stand, seven as witnesses for the prosecution and one as a witness for the defense. Of the seven called by the Government, four jurors, Heaton (Rec. 511, 512), Kern (Rec. 556, 557), Grenfell (Rec. 557, 558) and Glasscock (Rec. 559, 560), testified merely concerning the correctness of the operatives' report of the respective jurors' actions during the trial. They mentioned nothing of consciousness, or contact, or shadowing. One, Mrs. Annetta L. Bailey, a young and comely woman, testified that on the evening of October 28th, while at a bowling alley she be-

came aware of the fact that some men were looking at her (Rec. 510-511). It is interesting to note that the evidence shows that the shadowing by the Burns Agency's operatives of Mrs. Bailey ended on October 21st (Rec. 386).

Juror Herzog stated on the witness stand that some time during the trial he saw a man talking to a mechanic in front of his place of business (Rec. 559). He said it might have been O'Reilly, but he was not at all sure of it (Rec. 560); and at that time he did not know O'Reilly, or who he was. He further testified that during the trial, that while he had a suspicion that he was being followed, he was not aware of it (Rec. 559, 560). His explanation was as follows: One day, while he was driving home for lunch, he noticed a car driving in back of him, which car stopped on the opposite side of the street from his home. However, when he came out of his home after lunch he was not even interested enough to notice whether the car was still there or not; nor did he ever have any idea who was in the car (Rec. 560). The Government did not attempt even to prove that the man whom Juror Herzog mentioned as driving in back of him was an operative; or that the man was even in fact following Herzog; or that the occurrence was more than accidental, or was in any way connected with the Fall-Sinclair criminal case. As far as the record shows, the man driving in back of Juror Herzog was a stranger to and in no way connected with the surveillance. Moreover, Herzog testified, "I cannot identify the man that I saw in the automobile that came up and stopped. I could not

identify him if I saw him again. The different agents of the Burns people were brought in the room where the jurors were, and Burkinshaw asked me and the rest of the jurors to watch them closely and see whether or not I could identify any one of them" (Rec. 560 and 561).

Much was attempted to be made of the testimony of juror Kidwell. On Sunday, October 30th (Rec. 482, 493, 498, 505) Kidwell saw a man at a place known as "Horan's Near Beer Saloon." He had no idea then who this man was. When he later saw Burns operative Klein, in the court house after the mistrial, he identified him as being this man whom he saw at Horan's. Klein and his wife (Rec. 472) testified that on October 30th Klein had discontinued his work in Washington as an operative and was in New York. Klein's reports, introduced by the Government, show this. Kidwell also testified that at another time during the trial, while getting on a street car, he saw a person, whom he afterwards learned to be the Burns operative Merritt, get on the same car (Rec. 482). He did not know who Merritt was at that time, nor that his name was Merritt (Rec. 489). Juror Kidwell knew a man who resembled Merritt so much that he looked at Merritt a second time to see whether or not it was his friend (Rec. 506). He did not see Merritt again (Rec. 506). Kidwell also testified that on one occasion during the trial—he did not know the exact date—while he was sitting on a bench in the Smithsonian grounds eating his lunch, a man approached him and sat down on the same bench and asked him

for a cigarette. As Kidwell had no cigarette, he gave the man some tobacco, with which the man rolled a cigarette. The man thanked him, said it was nice weather and said no more. Kidwell then left and the man remained (Rec. 483, 484, 486). Kidwell did not know the name of this man nor could he identify him (Rec. 489, 498), although he observed all of the Burns Agency's men during the contempt proceeding with a view to identifying them, if possible. In spite of this testimony, the Government attempted to insinuate that operative Stewart must have been the man who thus approached Kidwell, because of the fact that Stewart on one occasion shadowed Kidwell to the Museum Grounds and reported that no one approached him. However, Kidwell testified that he was in the Museum Grounds while serving as a juror nearly every day of the week except when it rained (Rec. 482). The fallacy of this contention is clearly shown by the fact that Stewart shadowed Kidwell only on October 20 and in the early morning of October 21 (Rec. 440 and 441).

On another occasion Kidwell was going through the west door of the court-house and a stranger approached him and asked how he could get in to hear the trial, saying he had been waiting around all morning in an attempt to get in to hear the trial. Kidwell made no answer and the man then asked him what they were doing in the trial and what he thought of it. Kidwell walked into the court-house without answering the stranger (Rec. 490, 491). Kidwell could not identify this man. *He testified that at no time during the criminal trial did he see the men whom he now knows to be Burns Agency operatives* (Rec. 488).

The respondents below produced one witness, William H. Goucher, who testified that at no time during October 23, 1928, was he aware of being shadowed by any one (Rec. 771). The purpose of this testimony, and the effect of it, was to conclusively show that an inference in a report of one of the Burns operatives of that date, that Goucher might have suspected someone was following or shadowing him, was untrue.

The above incident is an example of the care that was taken by the operatives in their shadowing work, for after operative O'Neill, who was shadowing Juror Goucher, became suspicious of the fact that the juror might be aware that he was being followed, O'Neill immediately reported this fact to O'Reilly, and O'Reilly instructed him, "If you think that the subject knows he is being followed, drop him, but be absolutely sure that you know that, and if you think you are wrong, continue on him and do the best you can" (Rec. 530 and 531).

The Government introduced evidence tending to show that there was a conversation among certain jurors in the jury room on the "subject of being watched or being shadowed." What that conversation was the Record does not show. It is not disclosed whether the jurors stated they believed they were being watched or that they believed they were not being watched, or whether they wondered whether they would be watched or would not be watched—the conversation merely was on the subject of being watched. What the subject of conversation was is known only to the District Attorney, who conducted the proceeding below, be-

cause he took pains to limit the answer to one of "yes" or "no." After objection was made to the question as to whether or not there was such a conversation, the District Attorney stated "That calls for a yes or no answer" (Rec. 498). Later in the examination of the witnesses, there was this question: "Now, I am not asking you to tell what they said. Did Jurors Herzog, Holmes and Kern participate in that talk?" And later: "And without going into anything that was said, how long was the talk on that subject continued?" (Rec. 499).

Nowhere in the Record is there any evidence as to what was said, nor is there any question asked by the District Attorney attempting to elicit from witnesses what was said in the conversation among the jurors about shadowing.

V.

Kidwell-King-Akers Incident.

During the trial, Kidwell frequented an establishment on 4½ Street called "Horan's Near Beer Saloon." J. Ray Akers, a conductor of one of the local traction companies, and an acquaintance of Kidwell, frequented the same place. On October 28, 1928, Akers telephoned one Donald K. King, a reporter on the Washington Herald, and the two arranged to meet the same day (Rec. 596). They went to Horan's Saloon, and finding Kidwell outside, Akers invited him to have a drink (Rec. 517, 596). Kidwell accepted the invitation and King bought him a drink (Rec. 596). Akers then commented on the fact that Kidwell was on the

jury and King, of course, knew this fact (Rec. 596). He went there for the purpose of meeting Kidwell and to listen and to talk to him (Rec. 599). The three of them talked about the case for about one and a half hours (Rec. 517, 518, 596, 597, 598). Kidwell went out of the place and remained fifteen or twenty minutes. King waited, as he wanted more definite information. When Kidwell returned, King tried to detain him by asking him to stay and have another drink of intoxicating liquor. Kidwell refused. King did not get any further information, although he tried to do so by keeping Kidwell there, to afford him another opportunity to talk (Rec. 606, 607). King admitted that he gave Kidwell drinks of intoxicating liquor so that he would talk (Rec. 607). King then reported this conversation to the District Attorney (Rec. 525). Both King and Akers then made affidavits stating what had taken place and they were filed in the court the following day, November 1, 1928 (Rec. 600). The conversation that occurred at the instance of King and Akers was one of the causes, and in truth the only real cause of the mistrial. Over the objection of the appellants the testimony relating to the Kidwell-King-Akers incident was introduced, although it was admitted that King was not interested in, or acting for any of the parties to the action, and was not there at the instance of, or on behalf of any of the appellants, nor to find out anything for them (Rec. 611). Indeed their whole attitude was hostile to the appellants. What is most interesting was that this conversation of King and Akers, in violation of the court's direction to the

jurors not to talk about the case to any one, was the only act connected with the mistrial that amounted to a contempt of court. No proceeding was brought against King or Akers, and in fact they were given every protection by the court and the District Attorney.

VI.

Concerning the Burns Agency's Operative, McMullin.

William J. McMullin was a witness for the prosecution. His character was so discredited, and his testimony is so unworthy of consideration that it should be unnecessary to discuss it but for the fact that he was sworn and testified as a witness. Our review of it will be brief.

In September, 1927, McMullin applied for a position as a detective or operative with the Burns Agency under the assumed name of "William V. Long" (Rec. 634). He did this to hide the fact that he was an ex-convict (Rec. 628) and because he had the year previous applied for a position in the Burns agency under his own name and his application had been refused. He not only forged the name of William V. Long, an acquaintance of his, to his application with the Burns Agency, but he used the character and references of Long, so that, when an investigation was made by the Burns Agency before employing him, the character of Long was the one that was investigated. Long's reputation was found to be excellent, hence McMullin was employed by the Burns Agency as William V. Long

and not William J. McMullin. Under the name of Long his application was accepted, and he was sent to Washington as one of the operatives on the work of keeping the jury in the criminal case under surveillance (Rec. 614). He operated ten days, making a report each day, six of which were false as to the facts and nine false with respect to his expense accounts. The only one that did not contain a fraudulent expense account was the one made on October 28 when he worked with another operative, named Merritt, when it was impossible for him to pad his account (Rec. 646).

Based on one of his false reports, namely, the one of October 22, 1928, wherein he stated that he had observed juror Glasscock in company with one of the employees of the Department of Justice, he came to Washington after the mistrial had been ordered and not only made a false affidavit but forged the name of Long in doing so (Rec. 654). He admitted that the affidavit was false (Rec. 639) and denied making diagrams of the Flying Field (Rec. 640). In fact he said that he had never been there. He said that Ruddy gave him the false material to put in this report of October 22nd and the affidavit of November 3rd, while they were both at the Harrington Hotel on the morning of October 22nd (Rec. 618). Ruddy's denunciation of that is wholly justified, not only by the fact that Ruddy was not at the Harrington Hotel on the morning of the 22nd, but was at the Wardman Park Hotel with operative Robbins and the appellant Day (Rec. 767), but also by Judge Wright's detailed and circumstantial account of his preparation of the affidavit and by the

testimony of Mr. Lodge, who was present when the affidavit was prepared and signed.

> "In November, 1927," said Judge Wright on the stand, "I met the witness W. J. McMullin for the purpose of getting from him an affidavit in the contempt case. * * * I saw McMullin on the 3rd of November about four o'clock at my office. He told me he had been at my office the day before, and I, not being there until after four, he had left and gone away.
>
> "I inquired as to his movements in the shadowing of Juror Glasscock. He told me that on the occasion which was identified as that upon which he had shadowed Glasscock to the flying field, that he had been in the vicinity of Glasscock's place of employment, Somerville's Plumbing Supply establishment, that Glasscock came out, entered in his automobile, drove through D Street to Pennsylvania Avenue; that he, McMullin, had observed a two-toned roadster to which his attention was directed because it had forced itself in between him and Glasscock's car; that his attention was attracted by that as well as by the two-tones of the car, and while they were proceeding along Pennsylvania Avenue, he read the number, but that the traffic was somewhat congested and he did not have the opportunity to put the number down on the Avenue, because he had to watch his driving with both hands. As Glasscock turned northwardly from Pennsylvania Avenue, the two-toned roadster followed him; that he, McMullin, followed the two-toned roadster. There was practically no traffic on that street, and that he then took a card from his pocket with

one hand and a lead pencil and noted down the car number on his card, the number which was in the affidavit, the license number of the two-toned car. He said that Juror Glasscock drove to his house; the two-toned car went on without stopping. Glasscock came out with his wife and two children, entered his own car, and drove to the Potomac Flying Field in Virginia. I said, 'the flying field is not in Virginia, it is in Maryland.' I did not know then that there was a flying field in Virginia, but I knew that there was one in Maryland, Bolling Field, because I pass there twice a week every week. He said "No, it is in Virginia.' I said, 'No, you are mistaken. You went across the Navy Yard bridge, didn't you, to get to it?' I motioned with my hand to the direction of the Navy Yard bridge. He said 'No, I did not go across that bridge at all. I went across this bridge down here, the bridge that has a street car track on it, and right below it is a railroad bridge. That is the bridge I went across.' He said, 'At the other end of it, just at the left hand end of the bridge that I went over, is a large yacht club. There are a great many yachts.' I knew that yacht club. That is the Corinthian Yacht Club, that there was a yacht club there, and I had occasion afterward to go to Alexandria, I think it was the 4th of December, being interested I noticed when I crossed the bridge whether or not there was a flying field over in that vicinity, and I saw, much to my surprise, that there was. It was the first time I ever knew that it was there. He told me that there was a parking space on both sides of the entrance to the flying field, and that there were five or six cars

already parked; that Juror Glasscock's car was parked on the right of the entrance, but he, McMullin, undertook to park on the left of the entrance so that Glasscock would not notice him. As he was parking, he noticed the same two-toned car that he had seen following Glasscock on the Avenue, coming up the street. After he had parked his car, he said that he alighted and walked around to the rear of the two-toned car and checked the number. Then he took out the card that he had written the number on and he checked the numbers, and they were the same. Then he looked towards Glasscock's car and saw Glasscock out of his car, or rather a short distance from his car, in conference with a man, and that they talked fifteen or twenty minutes. The man left Glasscock. McMullin watched him until he had entered the two-toned car. Then he drove away. He, McMullin, watched until Glasscock had entered his car and then he followed Glasscock home to his house. I questioned him in very considerable detail, so that I had the story practically in mind, before I undertook to dictate an affidavit. That was in my office on the afternoon of November 3rd." • • • "After dinner I went to Mr. Ruddy's room at the Wardman Park Hotel" • • • "I took a pencil and asked McMullin to sit down at the other end of the table, which he did. He sat down at my right; Mr. Lodge was a little bit behind me on my left. I wrote then in lead pencil, asking McMullin, perhaps six or eight lines in lead pencil, then called to Ruddy—Ruddy was in the other room—and said, 'Mr. Ruddy, we will save time if you will take this up and let the man at the typewriter be copy

ing this, and meanwhile I will write another paragraph for you, and we will formulate the affidavit in that way and save time,' because I was in a hurry. I handed it to Mr. Ruddy and asked him if he had any more papers. He went out in the other room and came back with some Wardman Park Hotel paper, and I wrote on the back of it. I would write about a paragraph, and I suppose I wrote, oh, at least five or six different sheets of paper, inquiring with great particularity of McMullin at the time, and when I would finish the paragraph I would read it over to him and say 'Now, have I got that right?' If there is any change of phraseology, —I do not recall that there was any—it was, of course, corrected. Then I would call Ruddy and Ruddy would take that paper out to the man in the other room, and I would start to write another series of lines, six, eight, nine, ten, or whatever it was, until I got to another period, and Ruddy would take that out. Meanwhile I told—my impression is I told Ruddy to telephone for Mr. Moore, who is the managing director of the Wardman Park Hotel, and who lives at the Wardman Park Hotel, and who is a notary public. I think he telephoned for Mr. Moore; at any rate, Mr. Moore came in but not, my recollection is, until after I had completed the writing of the affidavit. I do not recall whether Moore was there when McMullin and I were reading the affidavit over or not, because I sat with my back to the door and my face to the window. Mr. Shoemaker brought in the finished affidavit, with at least one carbon, and perhaps more. I have one carbon which I got at that time. I handed the original affidavit to McMul-

lin and read the carbon—not aloud. I said 'Now, read it over. Read it with care.' I read the carbon as he was reading the original. When he had finished reading it he said 'That is all right,' and started to take up the pen and sign it. Mr. Lodge said, 'Let me see that before you sign it,' and Mr. Lodge took it and read it and said 'That is all right; that is just what you have said, McMullin.' McMullin signed the affidavit. During the time that I was at the table, I have forgotten at just what period, McMullin took a piece of paper and drew a diagram of the entrance to the Flying Field and showed Mr. Lodge where Glasscock's car was parked and where his car was parked. Long is the name he used and I called him 'Long.' I saw the diagram he drew, and heard the discussion between them while he was drawing it. He had done the same thing in my office in a general way. When I told him that there was no Flying Field over there in Virginia but the Flying Field was in Maryland, he told me about going over the bridge that had a yacht club at the other end of it at the left hand end of the bridge, and he took a piece of paper that was on my desk and a pencil, and he said 'Here is the end of the bridge, and a street runs on that way, and another street turns around this way, and here is the Flying Field,' and he drew the entrance way. He said 'Glasscock's car was over here and I parked over here, and that is where I saw this two-toned car when it was parked.' I did not go to the entrance of the Flying Field. I had occasion to go to Alexandria one afternoon to attend to some corporate meetings, and I drove the straight road from the end of the bridge. I

understand the entrance to the Flying Field is on another road which you turn off to the right, and it is around the corner. I did not go around the corner, but I saw the sign up of the Flying Field. McMullin explained the location of the buildings at the Flying Field to Mr. Lodge. He did not explain any buildings to me in my office. Long read over the affidavit thoroughly, word for word. Lodge read it too. Every word of the affidavit was gotten from McMullin himself. He didn't have any report at my office, but he had the original report from New York at the hotel. When I was writing the affidavit in sections, when I would read a section to him, I would ask, 'Is this right?' I don't suppose I used the word 'true.' I had no suspicion it was not true. There is no doubt McMullin knew every word that was in that affidavit and every word he told me was correct with the idea he was going to swear to it. He came to my office on November 2nd when I was not there. He said that I telephoned Ruddy from my office while he was in my office. I did not. I did not telephone Ruddy. Welchans was with him a part of the time when he was in my office. • • • *I had no communication with the Burns, either direct or indirect, about this affidavit before it was prepared. I could have found the Potomac Flying Field entirely from the description McMullin gave me. I had not talked with anybody who is connected with the Burns Agency except Long, or McMullin about drawing this affidavit, prior to the time it was* drawn" (Rec. 730, 731, 732, 733, 734, 735, 736).

Lodge, a reputable member of the Bar of the District of Columbia, testified that he was present at the Wardman Park Hotel when Judge Wright drew the affidavit and McMullin signed it. He said:

> "McMullin, at Wardman Park when the affidavit was prepared, read it paragraph by paragraph before it was typewritten and after it was typewritten. I sat at the same table with Judge Wright when he drew the affidavit. He drew it in sections, paragraph by paragraph. On each occasion when it was brought back from the typewriter McMullin read it again, and read it before it went out to the typewriter. I knew Mr. Moore, the notary, by sight, but not personally. *I did not see or talk to William J. Burns or Sherman Burns about the making of that affidavit.*" • • • "*I was never authorized or directed either by William J. Burns or Sherman Burns or Charles L. Veitsch to deliver those affidavits to Justice Siddons. I hadn't talked to them*" • • • (Rec. 738).
>
> "McMullin drew another diagram at the Wardman Park on the occasion of the drawing of the affidavit. It was in detail, like the other one, and substantially the same. I had never heard of the Potomac Flying Field prior to either one of those occasions. Since this trial began I went down there to examine it with a view of seeing how it fitted in with his description. I found that the location of the things at the flying field complied accurately with the descriptions given by McMullin." • • •
>
> "When I went to the Potomac Flying Field in Virginia, I crossed the 14th Street railroad bridge. This is a street railway track on that

bridge. There is a street railway bridge a little to the left of that bridge as you go across to Virginia. There is a yacht club and a large number of boats congregated together on the left side of the bridge that you cross on the Virginia shore. The Potomac Flying Field is a half or three-quarters of a mile from the Virginia end of that bridge. As you leave the bridge on the Virginia end of that bridge, there are two roads, one which goes to the left, which takes you into Alexandria; the other to the right goes up toward the radio station and passes the Potomac Flying Field. The entrance to the flying field is on the right-hand road" (Rec. 738, 739).

McMullin was proved to be a self-confessed perjurer (Rec. 639), forger and ex-convict (Rec. 628). He testified falsely about the length of time he spent in the Ohio Penitentiary (Rec. 702). Defendants offered to show that this man was a deserter from the United States Army, a bigamist, and a man engaged in all manner of fraudulent enterprises. Four witnesses, William V. Long (Rec. 705), Harry F. Stahl (Rec. 708), Mrs. Janet Lantz (Rec. 709), and A. Lincoln Till (Rec. 710) (who, by the way, was one of the references which McMullin gave when he applied for employment in the Burns Agency under the name of "William V. Long") testified that they were acquainted with McMullin, that they knew McMullin's reputation for truth and veracity was very bad, and that they would not believe him under oath.

Generally and finally we charge that his testimony was so discredited and unworthy of belief that the

Trial Justice did not consider and could not have considered him or his testimony in rendering his judgment against the accused or any of them. The Government, to bolster up its case, sought to make it appear that operative McMullin, upon whom the Government relied to a large extent, repented of his part in the surveillance and of his falsification of reports because of the fact that he confessed to Owen J. Roberts and Atlee Pomerene, on October 24, 1927, that the surveillance was being carried on. But the Government's position falls when it is considered that after the date of the confession, so-called, McMullin continued to falsify his reports and to make fictitious expense accounts, and even went so far as to execute a false affidavit on November 3, 1927, and to perjure himself before the Grand Jury on November 8, 1927, by swearing that he was the genuine William V. Long. (Rec. 646, 654 and 639 and 646, 647.)

VII.

The Government's Knowledge of and Tacit Consent to the Surveillance.

The agents of the Government raided the headquarters of the Burns Agency and seized the records therein on October 31, 1927, thus putting an end to the surveillance. The mistrial occurred the next day. Eight days before the seizure of the records, complete knowledge of the surveillance came to Peyton Gordon, then United States District Attorney, and to Owen J. Roberts and Atlee Pomerene, special counsel for the Gov-

ernment in the Fall-Sinclair Criminal Case. The Government, by its principal witness, McMullin, proved without any dissent on the part of counsel just mentioned, that on October 24, 1927, McMullin laid bare the whole plan of the surveillance to Government counsel. Notwithstanding this knowledge, counsel for the Government permitted the surveillance to continue; were not impressed with its so-called viciousness; did not, as far as the Record shows, bring it to the attention of the court; took no steps whatever to curtail it until eight days thereafter, when upon hearing of the Kidwell-King-Akers incident, they made application for a discharge of the jury.

VIII.

Concerning the Filing of the McMullin Affidavit.

During the trial no attempt whatever was made nor was there any evidence tending to place the burden of preparing and filing the McMullin affidavit on this appellant, but it was attempted to show that William J. Burns was solely to blame; nor did the trial justice in his opinion find or charge that appellant had anything to do with the filing of the affidavit.

It was further shown by the testimony that the affidavit was filed some time after the main case had been concluded and there was nothing pending before the court, but the most important fact here to be noted is that *it was not filed by any of the respondents*, but by the trial justice himself. Judge Siddons, during the proceedings, said: "It was filed by the court. I filed

it. It was never asked to be filed and I filed it" (Rec. 1, Addition).

IX.

The Activities of this Appellant, W. Sherman Burns

It appears elsewhere in this statement of facts that this appellant limited the scope of the employment by his original instructions to Ruddy, and then by his checking up these instructions to Ruddy to see that his understanding of the scope of the employment was correct. He not only in his first instructions to Ruddy limited the work to a surveillance of the jury, but he even took the precaution of instructing Ruddy to call him back on the telephone after Ruddy saw Day and got the details of the work. Ruddy did this and told him that his assumptions were correct as to the character of the work, and he again limited the activities of the men to a surveillance of the jury. He also instructed both Ruddy and the men, and instructed Ruddy to instruct the men that they were not to approach, embarrass or in any way permit themselves to be known to the jurors, or to permit the jurors to know that they were being shadowed by them. He went even further. After his talk with Day he called Mr. Scanlon, the manager of the New York office of the Burns Agency, and talked over with him the selection of the personnel of the operatives to be employed. He told Mr. Scanlon that it was to be purely a surveillance job and that he wanted "shadow" men, and that the men who were to come to Washington would be in-

structed not to come in contact with any of the jurors or embarrass them in any way and that if a juror became aware that he was being shadowed the operative should walk away and discontinue the surveillance (Rec. 776).

He did not take any part in the activities of the Agency in connection with the work in Washington between October 18th, the night on which he had his talk with Ruddy, and October 31st, the day on which the records of the Agency were seized (Rec. 778). He did not read any of the reports until November 2 (Rec. 778) (after the mistrial). He never saw the O'Reilly report on juror Kern or any other report on that juror until November 7th when Mr. Burkinshaw, the assistant district attorney, showed them to him when this appellant appeared before the grand jury (Rec. 778). On November 3rd he sent McMullin's report of October 22nd to Washington by special messenger at the request of Ruddy, who said that the client's attorney wanted the original written report immediately. He did not know that they wanted it as a basis of an affidavit; and he learned for the first time on November 5th that the affidavit had been made by McMullin (Rec. 784). When he sent the report to Washington he had no knowledge or suspicion that there was anything wrong or inaccurate about the report (Rec. 778). When Ruddy informed this appellant that he, Ruddy, had been taken before the grand jury, this appellant told him to turn over everything he had to the grand jury for its use (Rec. 784, 785). This appellant did not at any time authorize Rudy or O'Reilly or Day, or any-

one else, to do any work or engage in any activities for the Burns Agency or for him personally, other than to shadow the jury in the manner set forth in his instructions to his subordinates (Rec. 777). He did not know of the visit of O'Reilly to the Kidwell house; he did not authorize it and it was not within the scope of his instructions. Nor did he know of the investigation of the Kern mortgage, and that also was not within the scope of his instructions. He never knew of or authorized or countenanced the insertion of false statements in the McMullin reports, either by or through Ruddy or anybody else in the Burns Agency (Rec. 778). At no time before November 8th did he know or suspect that any of the operatives connected with the work of shadowing the jury had to any extent inserted false information in any of their reports. He never heard any reports challenged until juror Glasscock and H. R. Lamb, an employee in the Department of Justice, challenged the McMullin report when they appeared before the grand jury on November 7th (Rec. 778). Beyond the first conversation, he had no communication, directly or indirectly, with Pay regarding the Fall-Sinclair criminal case, nor did he have any conversation at all with Mr. Sinclair (Rec. 786). To briefly summarize: This appellant, as the manager of the Burns Agency, merely accepted the employment; and, accepting it, strictly defined its limitation. He had no part in the making or disposition of the so-called McMullin affidavit other than to send down the report from which it was made, not knowing what was to be done with it. After the seizure of the records he cooperated in every

way with the District Attorney. The District Attorney, in addressing the court, said, "and with respect to Sherman Burns, I feel that when he was summoned before the grand jury that he did bring the papers and records that were called for. I feel differently towards him for that reason than towards any of the others, and in the presentation of the matter before the grand jury he coöperated very extensively with the District Attorney" (Rec. 856).

X.

Concerning the Practice in the Department of Justice of Shadowing Jurors.

It became apparent from the outset of the case that the trial justice was of the opinion that the mere shadowing of jurors, irrespective of the effect such shadowing might have had on the due administration of justice, was contempt of court. Indeed, he so ruled at the very beginning of the proceeding, and the major portion of the trial was taken up with testimony that related purely to the surveillance of jurors. This testimony was admitted and considered by the trial court, over the objection of all the respondents, counsel taking the position that before such testimony could be introduced or considered it would have to be shown that the particular acts complained of obstructed, or tended to obstruct the administration of justice. When it came time for the respondents below to introduce testimony it became necessary, to meet the evidence offered by the Government, to show that the practice of shadow-

ing jurors, even by the Government, in criminal cases was one of long standing, and not an assault upon the administration of justice, as the trial court was bent upon deciding, and as the District Attorney contended. To accomplish this a large number of witnesses, consisting of two former chiefs of the Bureau of Investigation with the Department of Justice and thirteen former special agents or detectives of that Bureau were offered as witnesses, and by them testimony was proffered that a practice existed in the Department of Justice, extending over such a long period of years as to ripen into a custom, of shadowing jurors in criminal cases and keeping them under a close, intimate surveillance, or to use the language of the trial justice, "espionage"—in other words, observing the jurors exactly as was done by the appellants in the Sinclair-Fall case.

Testimony was proffered to show that three or four years ago, in the very court room in which the contempt case was tried, the same District Attorney who prosecuted this appellant below had ordered and directed that not only the jurors in a certain criminal case be kept under a close and intimate espionage, but counsel for the defense as well. Many other instances of shadowing jurors by the Government were offered, but in every instance the trial court refused to admit the testimony over the objection of counsel. The testimony of this character was offered to show the custom of the Department of Justice and to purge the respondents of contempt, and also to minimize the character of the contempt and mitigate any punishment that might be imposed by the court. This prof-

fered and rejected testimony appears on the following pages of the Record: 712, 716, 719, 721, 723, 751, 787, 790, 793, 797, 799, 802, 803, 804 and 805.

The testimony of Mr. A. Bruce Bielaski, a former chief of the Bureau of Investigation of the Department of Justice from April, 1910, to February, 1919, is an example of the testimony that was offered and excluded. In part it is as follows:

> "Q. During the time that you were chief of the Bureau of Investigation of the Department of Justice do you know as a fact that it was the custom and practice of the Department, upon request being made by special agents in the field, or by the United States District Attorneys in the several districts of the United States, to assign men to shadow jurors who were sitting in cases which the United States was prosecuting individuals or corporations for alleged crimes and offenses against the United States?
>
> "Mr. Gordon: We object, if the court please.
>
> "Mr. Hoover: We make the offer that if the witness were permitted to answer he would testify that he did know that such a custom and practice had existed, and we offer to prove that on the ground, first, that the usage, extending over this period of years, had ripened into a custom, and that that custom became the law, and that being so there should be no contempt of court under the facts in this case as related to the question of usage. Your Honor has already ruled on that. In addition to that, I offer it on this ground that in a case where a man is charged with contempt of court, he has the right during the proceedings investigating

the matter of contempt, to offer any evidence which may tend to purge him of the contempt, either by minimizing the character of the contempt or mitigating any punishment that might be imposed by the court. We offer it on both grounds, may it please the court."

The objection was sustained and exception duly noted.

"Mr. Douglas: I make the same offer on behalf of Burns and reserve an exception.

"Mr. Wright: Mr. Day also makes the same offer and notes an exception.

"Q. I ask the witness this question subject to your Honor's ruling, if it is not a fact that during the time that you were the chief of the Bureau of Investigation of the Department of Justice, over the period of 1912-1919, as you have testified, that representations were made by men in charge of special agents, or by special agents, of activities of these special agents in shadowing jurors who were selected and sworn in criminal cases in which the United States was prosecuting its citizens for alleged violation of the law, and that such representations were brought to the attention of the Attorney General who was in office at the time when such reports were received in the Department of Justice?"

The question was objected to on the same grounds, the objection sustained and exception duly noted by all respondents.

"Q. Did or did not the several Attorneys General who were in the office during the time

that you were in office, in the incumbency of your office in the Bureau of Investigation in the Department of Justice, know of or approve the custom of shadowing empanelled jurors by the United States representatives?"

The question was objected to on the same ground, the objection sustained and exception duly noted by all the respondents, and the proffer made that the witness would say that they did if permitted to answer (Rec. 788, 789, 790).

XI.

THE TRIAL COURT'S RULING.

After the conclusion of the evidence, the trial court rendered his finding of law and fact in the form of an opinion given in open court; and after motions duly made to discharge this appellant; and exceptions duly noted to the findings of law and fact, this appellant was adjudged guilty of contempt of court, and was sentenced to pay a fine of $1,000. The opinion of the court will be discussed in detail in a subsequent portion of this brief.

POINTS OF LAW UPON WHICH THIS APPELLANT RELIES.

The respondent, W. Sherman Burns, having appealed to the Court of Appeals of the District of Columbia from the final judgment entered in the above entitled cause, and the said cause having been certified to the Supreme Court of the United States, and the entire

Record having been brought up, states that the points upon which he intends to rely in this court in this cause are as follows:

POINT 1. The petition did not allege facts constituting contempt of court.

POINT 2. There was no evidence adduced at the trial below upon which the findings of the court could be legally based.

POINT 3. The trial court erred in admitting evidence of the operatives reports.

POINT 4. The trial court erred in not admitting testimony as to the intent of this appellant.

POINT 5. The trial court erred in admitting evidence of things done after the mistrial of the Fall-Sinclair criminal case and when there was no cause on trial before the court.

POINT 6. The trial court erred in not admitting evidence that there was no consciousness of the surveillance in the mind of any juror.

POINT 7. The trial court erred in admitting evidence of acts of persons not shown to be connected with any of the appellants or with those acting in their behalf.

POINT 8. The court erred in limiting the cross-examination of Frank J. O'Reilly, a Government witness.

POINT 9. There was no contempt of court committed by this appellant with respect to the preparation and filing of the McMullin affidavit.

POINT 10. In view of the rulings and findings of the trial court, the court should have allowed the introduction of evidence concerning the practice and custom of the Department of Justice of the United States of shadowing juries in criminal cases.

POINT 11. The trial court erred in admitting and considering testimony relating to the Kidwell-King-Akers, incident, with which the appellants had nothing to do.

POINT 12. The trial court erred in restricting the right of the appellants to discredit the Government's witness McMullin, both by limiting the cross-examination of the witness and by rejecting testimony concerning his previous life and relating to his fraudulent acts.

POINT 13. The findings of law and fact made by the trial court in the decision at the conclusion of the case are erroneous.

ARGUMENT.

POINT 1.

The Petition did not Allege Facts Constituting Contempt of Court.

The petition upon which the contempt proceedings below are based is utterly lacking in any averment or suggestion that any contact, direct or indirect, was ever made or established by the respondents or anyone acting in their behalf. There is no charge that any juror

was ever conscious of being observed. It is devoid of any allegation charging obstruction of, or any tendency to obstruct the administration of justice. If it charges anything, it is an observation of the jury, at the instance of the appellants, by a group of detectives during the trial of the Fall-Sinclair criminal proceeding.

The allegations of the petition constitute an attempt to charge a *conspiracy* to commit a contempt of court and nothing more. This is not sufficient. Conspiracy to commit a contempt of court is not contempt of court. The designs of the conspirators must be carried into action and effect, and the acts done must in themselves obstruct, or directly tend to obstruct the due administration of justice and the petition must so allege. This is axiomatic. It is very clear that the Government misconstrued its cause of action and labored under the impression that if it could sustain the charge that the respondents had entered into a conspiracy to commit a contempt of court, that they could be convicted of criminal contempt of court. This is apparent from the remarks of the District Attorney in his opening statements (Rec. 76, 77 and 78).

The motion to dismiss the petition made at the outset of the trial should have been granted because the facts as alleged therein do not constitute a contempt of court. The same legal propositions that were involved in the consideration by the trial court of the motion to dismiss the petition were involved in the argument of the law bearing on the trial court's ruling in overruling the motion to discharge the appellants at

the conclusion of the Government's case, and the motion made at the end of the whole case, and for convenience these questions of law are considered, and this court is respectfully referred to the following division of our argument.

POINT II.

There was No Evidence Adduced at the Trial Below upon Which the Findings of the Trial Court Could be Legally Based.

(1) POWER OF FEDERAL COURTS TO PUNISH FOR CONTEMPT.

It is recognized that the Federal courts have inherent joint power to punish persons for contempt of court. It was so stated by Mr. Justice Field in *Ex Parte Robinson*, 19 Wall., 505, 513; 22 L. Ed., 205, as follows:

> "The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the court, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they become possessed of this power."

See also:

Ex parte Terry, 128 U. S., 289.

Erlenbecher et al. vs. District Court, 136 U. S., 267.

Under the Judicial Code of 1789 the Federal courts were vested with power to punish, by fine or imprisonment, at the discretion of the court, all contempts of authority. Because of the adoption of a practice by certain Federal judges, prior to 1831, of punishing, as contempt, criticism of themselves or of their decisions, such as imprisonment by District Judge Peck of an attorney who had criticized one of his decisions, Congress in 1831 enacted a statute to limit the power to punish for contempt in the Federal courts. This statute, originally cited as 4 Stat., 487, was reenacted, without change, in its substantive provisions as Section 268 of the Judicial Code. It reads as follows:

> "Administration of Oaths: Contempts. The courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (R. S. 725; Mar. 3, 1911, c. 231, 268, 36 Stat. 1163)."

While this section was undoubtedly intended to be one of limitation upon the power of the Federal courts (see *Cuyler vs. Atlantic et al. R. Co.*, 131 Fed., 97, and

Ex parte Robinson, supra), this court, in the recent case of *Toledo Newspaper Company vs. United States*, 247 U. S., 407, commenting upon the effect of the statute, said:

> "The provision conferred no power not already granted and imposed no limitation not already existing. In other words, it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed. * * * The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations, not restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation; that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly."

But while the power of Federal courts to punish for contempt is inherent and recognized, it is a power which must be used sparingly and with great caution and deliberation. To quote the language of the court in *Phillips Sheet, etc., Co. vs. Amalgamated Association of Iron, Steel, etc., Workers*, 208 Fed., 335:

> "The purpose in invoking the exercise of such power is the enforcement of law and of lawful orders and the punishment of acts of disobedience. A court thus called upon to enforce the law may itself keep well within its limits. It

> is not a party to the proceeding. In punishing for contempt, the judge acts impersonally and has no interest or concern other than the law should be obeyed and enforced. To justify punishment * * * the charge against the accused and the court of procedure must meet legal requirements, *and the proof must conform to the settled rules of evidence.*" (Italics ours.)

And in *Gompers vs. Buck's Stove & Range Co.*, 221 U. S., 418:

> "*The amplitude of the power is a command never to exert it where it is not necessary or proper.*" (Italics ours.)

So in the case of *In re Gitkins*, 164 Fed., 71, 75, the court said:

> "The power of the courts to punish for contempt has always been looked on in this country with much jealousy and a very strong disposition shown in all jurisdictions to restrain it. It has been declared to be arbitrary in its nature (*Batchelder vs. Moore*, 42 Cal. 412) and to be an exception to the provisions of the Constitution of the United States and not to be extended in the least degree beyond limits imposed by the statute (*Boyd vs. Glucklich*, 116 Fed., 136). * * * The proceeding is in its nature criminal and must be governed by the strict rules of construction employed in criminal cases."

Anderson, Circuit Judge, in the recent case of *Coll vs. United States*, 8 Fed., 2nd Series, 20, 24, held:

> "We may observe, generally, that it is now settled by decisions of the highest court in the

land that the broad, almost unlimited, power to punish summarily for contempt, asserted by many courts, may constitutionally be, and has been, limited by legislative enactment. It is now beyond question that the Act of 1831 (Judicial Code, p. 268) and sections 21, 22 of the Clayton Act of October 15, 1914 (38 Stat., 738 (Comp. St. p. 1245*a*, 1245*b*)) are, in the federal courts, valid restrictions on powers which many courts have asserted as inherent in all real courts.

"Another recent and significant decision showing the critical care with which the Supreme Court of the United States is now guarding this vitally necessary, but highly dangerous, power to punish for contempt, is *Cooke vs. United States*, 267 U. S., 517; 45 S. Ct. 390; 60 L. Ed., 767, decided April 13, 1925."

(2) In Criminal Contempt Proceedings the Accused is Presumed to be Innocent and his Guilt must be Proved Beyond a Reasonable Doubt.

The above principle was announced by this court in *Gompers vs. Buck's Stove & Range Company, supra*, as follows:

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

And in the recent case in the Court of Appeals of the District of Columbia of *Lombardo vs. United States*,

decided on November 5, 1928, and reported in 56 W. L. R. 833, Mr. Justice Robb, speaking for the court, said:

> "Counsel for the Government frankly concede that in criminal contempt as in criminal cases the presumption of innocence obtains and that proof of guilt must be beyond a reasonable doubt. (See *Gompers vs. Buck's Stove & Range Co.*, 221 U. S., 418; *Michaelson vs. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Railway Company*, 266 U. S., 42)."

This rule is so firmly established that it is hardly necessary to cite any decisions—certainly no others than above.

(3) The Essential Characteristic of an Act of Contempt is Its Tendency to Obstruct the Administration of Justice.

Section 268 of the Judicial Code, which limits the power of the Federal Courts to punish for contempt, states that this power "shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice," or misbehavior of officers of court, or the disobedience to a specific order or command of the court. The acts which these respondents were charged with having committed were not done in disobedience of any order of the court. Nor were the acts committed "in the presence of the court." Therefore, before they can be considered in contempt, their acts must be shown to have had the tendency "to ob-

struct the administration of justice." As was said by the Court in *Cornish vs. United States*, 299 Fed. 283, 284:

> "Where there is a prosecution, as for contempt, under section 268, Judicial Code (Comp. St. Par. 1245), and where it is not claimed that the alleged misbehavior was committed in the physical presence of the court, or constituted disobedience to an order, it is essential that the misbehavior shall have been 'so near thereto as to obstruct the administration of justice.'"

This "tendency to obstruct the administration of justice" is the one essential characteristic of contempt of court. Unless this element is present no act of contempt can be held to have been committed; while if the element is present the act is generally held to constitute contempt, regardless of the presence or absence of any other factors.

So, for example, we find the Supreme Court of the State of Mississippi holding that being in a court room in an intoxicated condition does not constitute contempt of court, if the fact is not brought to the attention of the court, and the business of the court is in no way interrupted. This was decided in the case of *Neely vs. State*, 98 Miss., 816; 36 L. R. A. (N. S.), 138. "A direct contempt," said the court in that case, "consists of such conduct or language on the part of the contemnor as interferes with the orderly administration of justice. * * * *There can be no such contempt of court unless the trial judge is conscious of it.*" (Italics ours).

And in *Harwell vs. State*, 78 Tenn., 544, it was held that while any attempt to control the action of the grand jury is contempt of court, a mere inquiry of a grand juror as to what had taken place in relation to a particular case is not.

Again it was held in *ex parte Wright*, 64 Tex. Cr. Rep., 171, that where, in contempt proceedings in the district court, for interfering with one of the special veniremen, the testimony of the veniremen did not indicate that relator undertook to influence him, or even to talk about the case in which he was summoned in any way; but the conversation between the juror and relator was that the latter said "You are on the jury next week," to which the juror replied, "Yes, I know I am," when they separated, the same was insufficient to support the judgment for contempt.

On the other hand, it has been decided by the Federal Courts that the clause " 'so near the presence of the court as to obstruct the administration of justice' applies to all acts of misbehavior, whose tendency and effect is to interfere with the administration of justice, wherever the acts may be committed. The test of the requisite of nearness is made by Congress to depend upon the effect of the act upon the administration of justice. If obstructive, in fact, it will be held to have been committed near enough the presence of the court to come within the meaning of the act." *United States vs. Huff*, 206 Fed., 700, 705.

"Tendency" as applied to criminal offenses has been most ably defined by Judge Cardozo in the recent case

of *People vs. Rizzo*, 246 N. Y., 334; 158 N. E., 888, where he said, at page 336:

> "The word 'tending' is very indefinite. It is perfectly evident that there will arise differences of opinion as to whether an act in a given case is one *tending* to commit a crime. 'Tending' means to exert activity in a particular direction. Any act in preparation to commit a crime may be said to have a tendency towards its accomplishment. The procuring of the automobile, searching the streets looking for the desired victim, were in reality acts tending toward the commission of the proposed crime. The law, however, has recognized that many acts in the way of preparation are too remote to constitute the crime of attempt. The line has been drawn between those acts which are remote and those which are proximate and near to the consummation. The law must be practical, and therefore considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference. The cases which have been before the courts express this idea in different language, but the idea remains the same. The act or acts must come or advance very near to the accomplishment of the intended crime."

Along the thought so ably expressed by Judge Cardozo in the Rizzo case, *supra*, is a well-known article "The Proximate Consequence of An Act" by Joseph H. Beale, Esquire, appearing in Vol. 33 (March, 1920)

Harvard Law Review, page 633, which, for the convenience of this court, we have appended to this brief.

(4) CONTEMPT DOES NOT DEPEND UPON THE INTENT OF THE CONTEMNER, BUT UPON HIS ACT.

Chief Justice Taney, in the early case of *Wartman vs. Wartman*, Taney, 362 Fed. Cas. No. 17210, made the following statement which has been quoted with approval in numerous subsequent cases:

> "As regards the question whether a contempt has or has not been committed, it does not depend upon the intention of the party, but upon the act he has done. It is a conclusion of law from the act."

So we find the Federal Circuit Court of Appeals for the Ninth Circuit in the cases of *Kelly vs. United States* and *Galen vs. United States*, reported together in 250 Fed., 947, holding Kelly and Galen in contempt of court for conversing and drinking with jurors in a hotel lobby and in a bar room, even though there was no evidence that the respondents had done the acts with any intent to influence the jurors or with an ulterior motive whatever. The court declared the test of contempt to be whether "such acts and communications were knowingly and willfully done and had the tendency to influence improperly the action of the jury."

Attention may also be called to the following state cases, in which persons have been held in contempt of court for conversing with jurors in a pending case, even though the act may have been done without

ulterior motives: *State vs. Brewer*, Del. Gen. Sess., 104 A 604; *Murphy vs. Wright*, 167 Iowa, 75; 148 N. W., 985.

(5) Intent to Commit Contempt Cannot Make an Act Contempt, Unless the Act Done Actually "Tends to Obstruct the Administration of Justice."

In an old Welsh triad is found:

> "*Three things are not to be redressed; a thought, a frown, and an intent without an act*" (Wigmore: Panorama of the World's Legal Systems).

An act may constitute a crime, even though it fails of its purpose or objective. A criminal contempt is *sui generis* in the law. Criminal intent, or *mens rea*, is not a necessary element. It may be committed by accident, or even with good intent on the part of the actor, if the act tends *in fact* to obstruct the administration of justice. The converse of the proposition is equally true. One may intend to bribe an entire jury. He may lay his plans, and obtain the money to carry out his design. He may even discuss it with third persons, but if his act stops there, if the jurors are not approached, and they have no knowledge of such designs, he does not commit contempt of court, because his act does not have, and cannot have, a tendency "to obstruct the administration of justice."

The decisions of the Federal courts on this question are definite and unqualified, with no dissent among them.

In the case of *Doniphan vs. Lehman*, 179 Fed., 173, the respondents, one of whom had been the plaintiff and the other one of the defendants in a civil action, were charged with contempt of court in conspiring together to use the court as a means and an end to destroy the business of other defendants in the civil action. The defendant Lehman was charged with having agreed with the plaintiff to give testimony which would result in the plaintiff being able to obtain large money judgments against the other defendants, in return for which service Lehman was to receive money from the plaintiff. Obviously such a conspiracy, if successful, would "tend to obstruct the administration of justice," in that it would make the court an instrumentality for the purpose of accomplishing the fraudulent scheme of the respondents. But there was no charge in the information under which the respondents had been held for contempt that their conspiracy actually effected the result sought. Their scheme had been detected in time to prevent its fruition. On this state of facts, Judge Baker of the Circuit Court for the District of Indiana declared that no criminal contempt had been committed by the respondents, and that conspiracy to commit contempt itself could not be considered as contempt of court. The court said:

> "A conspiracy to misbehave in or near the presence of the court for the purpose of obstructing the administration of justice does not of itself constitute a punishable contempt. *It is the act of misbehavior in or near the presence of the court and not the conspiracy which constitutes the contempt.* If the complainant

Doniphan and the defendant Lehman formed the alleged conspiracy they committed no contempt in so doing, and if they have committed overt acts in furtherance of the conspiracy they have not made themselves amenable to punishment for contempt, unless their acts constitute misbehavior in or so near the presence of the court as to obstruct the administration of justice." (Italics ours.)

The case of *United States vs. Carroll*, 147 Fed., 947, is even more closely in point. In that case one William Carroll was charged with contempt of court because of certain acts done in connection with the criminal trial in Montana of his brother, Joseph T. Carroll. It was alleged that William Carroll approached a man named Hopkins, handed him a list of the jurors who had been empaneled to try his brother, asked Hopkins if he was acquainted with one of the members of the jury, and stated that if he had any other friends on the jury he hoped he would use his influence with them for the benefit of Carroll's brother, the defendant. It was alleged that Carroll also stated to Hopkins that he had other lists which he was handing around. Hopkins neglected or forgot to comply with Carroll's request, and did not communicate with any of the jurors.

The court properly declared that "the question resolves itself into whether this demeanor on the part of Carroll tended in any manner to obstruct the administration of justice," and held that "the endeavor Carroll made with Hopkins to have him use his in-

fluence with the jury, for the purposes indicated, did not constitute a contempt punishable under Section 725 Rev. St., which defines and limits the power of the court in the premises." Judge Wolverton even went so far as to say:

> "I am firmly convinced that it was the purpose of Carroll to reach one or more of the members of the jury through Hopkins, if the latter could be had to serve his purpose. The act was wilful, vicious and reprehensible and should be visited with appropriate punishment, but the court is unauthorized to mete it out in this proceeding."

The opinion also contains a careful analysis of the meaning of the word "obstruct" as used in Sec. 725 Rev. St. The court refers to Sec. 5399 Rev. St. as a cognate section to Section 725, and quotes from the case of *United States vs. Rittinger*, 24 Fed. Cas., 1149, No. 14598, in which it had been held: "It will be necessary for you to find that the defendant, Rittinger, did some act or acts which obstruct or impede the due administration of justice." "Thus giving the impression," said the court in the Carroll case, "that the act complained of must have the direct effect *within itself* to obstruct or impede the administration of justice."

Further analyzing these key words in Section 725, Judge Wolverton, in his opinion, continued as follows:

> "In a much later case, *United States vs. Seeley*, 27 Fed. Cas., 1010, No. 16248 A, the court discusses directly the import of the words

'obstruct' and 'impede' as employed in the same section 5399. It says:

"'To "obstruct," independent of the acceptation the word has obtained in the criminal law, would seem to stand *ex vi termini* a direct and positive interposition which prevented, or tended to prevent, the action of the officer of court in respect to a matter then to be proceeded in. "Impede" must necessarily bear a similar import, and, if there be any discrimination between the two terms, it can only be that the same direct and positive interference may, without amounting to a complete obstruction, become an impediment to the action intended to be intercepted. The intention of the legislature to give these terms an application only to direct acts of violence or menace is inferable from the construction that the endeavor is made equally criminal with the entire completion of the purpose. An endeavor to obstruct or impede, etc., by threats or force, would necessarily imply the effort to put forth some act, which in its natural, if not necessary consequence, must be attended with an obstruction, and with a forced and compelled interruption of further progress in the administration of justice.'

"Thus again indicating that the act put forth must itself have the direct and natural effect to obstruct or impede. If this be so, then the act of Carroll in endeavoring to get Hopkins to do something for him or his brother, with the jury, which Hopkins never consented to, could, of itself, have no direct or sensile effect to obstruct or impede the due administration of justice. It was an endeavor which in no way reached or influenced the jury, and, therefore,

> tended in no way to impede justice or the administration thereof. If the endeavor had been directly within the jury or a member thereof, then it would have reached the mark; but an effort to get a third person to act, who declined, stops short of a misbehavior that is effective to obstruct or impede justice, or to hinder its administration."

And so also in the state courts, a bare attempt to obstruct the administration of justice, that does not reach its mark, is held not to constitute a criminal contempt. The question was carefully considered by the Texas court in the case of *Ex parte McRae* (Tex. Cr. App.), 77 S. W., 211, where the court said:

> "We do not understand the authorities to go to the extent of holding that the bare effort on the part of relator to secure the service of a party to find out how the jury stands in reference to a case then on trial would, *per se*, authorize punishment for contempt, unless the party so employed by the relator should make some effort to tamper with the jury, or hold out some inducement to the jury to decide one way or the other, or should talk with the juror about the case, with a view to ascertaining what position he occupied in reference to the testimony."

In another Texas case, *Ex parte Kemper* (Tex. Cr. App.), 216 S. W., 172, the relator approached the brother-in-law of a juror and offered money to be given to the juror, if he would hold out for acquittal in certain cases. The matter was never communicated to the juror. Said the court:

> "In our opinion, when the alleged contempt is an attempt to interfere with the jurisdiction or processes of the court and the same has never reached the point of any kind or color of communication or contact between the corruptive effort and the officers, processes, or matters sought to be interfered with, the power of contempt is lacking."

There was a similar situation in the case of *In re Ellison*, 256 Mo., 378; 165 S. W., 987, where Ellison approached one Highsmith and endeavored to reach a juror through Highsmith, or have Highsmith do what he could with a juror to aid the plaintiff in a case on trial in which the juror was sitting. In reversing the ruling of the lower court holding Ellison guilty of contempt, the Supreme Court of Missouri said:

> "I have failed to find a single case where the court has punished a person, as in this case, where he in no manner approached, discussed, or offered to bribe the juror or officer in person. In other words, the courts seem to attach to the words, 'to attempt to influence a juror' the meaning that the contemnor or his representative must approach the juror in person before the contempt is completed."

See also the case of *Coons vs. State*, 134 N. E., 194, where the Indiana court held that whether a contempt had been committed did not depend on the alleged intention of the offender, but on his act; and the case of *Kneisel vs. Ursus Motor Co.*, 316 Ill., 336; 147 N. E., 243, where the court held that the act of an offender

and not the alleged intent determines whether a direct contempt has been committed.

Viewed in the light of the foregoing cases, it is obvious that even if the Government should have proved a criminal conspiracy on the part of these respondents corruptly to influence or to intimidate the jury in the Fall-Sinclair case, such a conspiracy alone could not constitute contempt of court. The alleged conspiracy could not be contempt as the offense is defined in the Federal Courts, regardless of what overt acts might have been committed in furtherance thereof, unless some of the acts, in themselves, disconnected from any question of intent, had the effect of obstructing or a tendency to obstruct the administration of justice in the case of United States ex. Fall and Sinclair. Such a conspiracy has, of course, not been shown. Nor is there any evidence in the case that tends to show any intention whatever on the part of any of the respondents to do any act which was not their legal and moral right to do. But had such intention been found to exist, the Government would have been compelled to go very much further to establish contempt. It would have had to have shown by the evidence, and shown beyond all reasonable doubt, that these respondents, or some of them, did some act or acts, or authorized to be done for them some act or acts which in and by themselves and disconnected from any alleged improper intent, tended to obstruct the administration of justice in the Fall-Sinclair case. The question of criminal intent must be eliminated. Even if it were assumed to have been present, it could

not be considered in determining whether or not a contempt of court had actually been committed.

(6) Whether or Not an Act Constitutes Contempt of Court is Determined by the "Reasonable Tendencies of the Act" to Obstruct the Administration of Justice.

At the trial below both the Government and the respondents relied upon the case of *Toledo Newspaper Company vs. United States*, 247 U. S., 402; 62 L. Ed., 1187, decided by this court. The facts in that case, briefly stated, are as follows: The Toledo Railway & Light Company, operating street railways in the city of Toledo, Ohio, entered into negotiations with the city for the renewal of its franchise which was about to expire. In November, 1913, the city, without giving any new franchise or making any contract with the traction company, passed an ordinance which provided that on or after March 7, 1914, three-cent fares should be charged from day to day. In January, 1914, creditors of the company filed a bill in the Federal court to enjoin the carrying out of the ordinance on the ground that to do so would confiscate the property, in which the creditors had certain rights. In March of the same year a supplemental bill was filed, making the city a party to the suit, and asking for premilinary and permanent injunctions against the city. The company also filed its bill against the city seeking to restrain the enforcement of the ordinance both by preliminary and permanent injunctions. The matter became one of considerable public interest, and the people

of Toledo were vehement in their opposition to the suits which had been filed by the Railway Company and its creditors. The *Toledo News-Bee*, a newspaper with a circulation of more than 50,000 copies daily throughout the city, was particularly hostile to the Railway Company, and especially to anyone who defended the position taken by the company and its creditors. The matter of the preliminary injunctions came on for hearing before District Judge Killits. While the motions were pending, certain mass meetings were held and the *News-Bee* published accounts of these mass meetings and clearly indicated in its columns that Judge Killits was unfair. Scurrilous attacks were made by the newspaper upon Judge Killits, and several days later the newspaper published an editorial vigorously criticizing the Judge. This continued for some months. The paper even went so far as to advocate the disregarding of the injunction if granted. As a result of the publication, the newspaper company and its editor were tried and adjudged guilty of contempt of court. The case finally reached this court, and in discussing the law of the case, Mr. Chief Justice White, among other things, said:

> "The test, therefore, is the character of the act done and its *direct* tendency to prevent and obstruct the discharge of judicial duty." (Italics ours.)

The Government in the trial below apparently placed considerable reliance on the this court's opinion relating to the third contention of the appellants in the Toledo case. This court said:

"And thus we come to the third and final subject, which is:

"3. The contention that there was no evidence whatever to justify attributing to the publications the consequence of obstruction and therefore no legal basis for the conclusion of guilt and resulting right to impose penalties."

The court continues:

"It is to be observed that our power in disposing of this objection is not to test divergent contentions as to the weight of the evidence, but simply to consider the legal question whether the evidentiary facts found had any reasonable tendency to sustain the general conclusions of fact based upon them by the courts below. Considering the subject in this aspect again we are constrained to say that the contention *on the face of the record is too plainly devoid of merit to require any detailed review*. Indeed, we are of opinion that the court below was right in saying, concerning the ultimate conclusions of fact upon which its action was based, that it was *'difficult to see how any other findings could have been made.'*" (Italics ours.)

Here this court had in mind the record in the case below reported as *United States vs. Toledo Newspaper Company*, 220 Fed., 458, 461 wherein, in the opinion of Judge Killits, the one against whom the attacks were made, it is recited:

"It is admitted that the paper in question containing these publications circulated to the extent of more than 50,000 copies daily in and

> about the city of Toledo, wherein sat the court in question and resided the judge thereof subject to comment in said publications. *The order directing the district attorney to file the information and signed by the judge of the court recites the fact of his residence in the city of Toledo, and that, as a daily reader of the newspaper in question, the several publications had come to his personal attention.*" (Italics ours.)

Here was evidence and the only evidence necessary to show that the publications were seen by the presiding judge. The judge could not testify before himself. He was the trier of the contempt proceeding and at the same time the object of the attacks made by the contemners in their attempt to obstruct the administration of justice. It was not necessary, and it would have been absurd, for him to have taken the witness stand. He knew that he had seen the publication. There was no testimony to the contrary.

This court, then further commenting on the contention that there was no evidence to show that the publication had come to the attention of the judge, continued:

> "True, it is urged that although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the circumstances which we have stated, in a daily paper having a large circulation, as it was not shown that they had been seen by the presiding judge or had been circulated in the court room, they did and could form no basis for an inference of guilt."

The District attorney contended below, and no doubt will contend in his brief and argument before this court, that what this court said, in that portion of the opinion just quoted, was that it was true that there was no evidence to show that the presiding judge had seen the publication, whereas all this court said was that such was the contention. What the court meant is clearly seen from what follows in the opinion:

> "But the situation is controlled by the reasonable tendencies of the act and not by extreme and substantially impossible asumptions on the subject."

Certainly what the court meant by "extreme and substantially impossible assumptions" was an assumption that the judge did not see the publication. This court was right in saying that it was an extreme and substantially impossible assumption that Judge Killits did not see the publication. His resumé of the case shows that he did see them. His opinion in 220 Fed., 458 to 516, clearly shows that Judge Killits was subjected to probably the most vicious and scurrilous attack to which any judge, Federal or State, has ever been subjected, and this court is, of course, familiar with that opinion, which is too voluminous to quote in its entirety. We think it pertinent, however, to mention some of the acts committed by the Newspaper Company and its editor. The Railway Company was called the "Big Con." On March 24, 1915, appeared the following statement: "That Henry L. Doherty is directing operations, the Big Con got busy early on Tuesday

in its efforts to evade the provisions of the Schreiber 3 cent fare ordinance." In a cartoon in the same paper the traction company was represented as being "In the Last Ditch," and the editor admitted that the "last ditch" was intended to mean the court. On March 25, 1915, the day before the hearing, a cartoon appeared on the front page of the paper entitled "A Desperate Case," representing the "Big Con" as a very corpulent person in bed very ill, with his attorneys and Mr. Doherty around him in great anxiety, one of them exclaiming that "We'd had better call in Doc. Killits." In the same article there was a news item head in big type across five columns "Car Riders May Ignore Order Barring Low Fare." Another subheading in the form of a "tabloid" paragraph was "Mass Meeting of Municipal Ownership League at Memorial Hall, to be held Friday night. Plan laid that Memorial Hall crowd shall remain in session until midnight, then swarm on cars and refuse to pay more than three cents."

Another article detailing the plan reads:

> "It has been planned, *restraining order or no restraining order by the federal court*, to test the strength of the three-cent fare all-day ordinance immediately following the closing of the meeting of the Municipal Ownership League in Memorial Hall on Friday night, unless, before that time, other counsel prevails. The Schreiber ordinance will become effective at midnight on Friday, or 12:01 a. m. on Saturday. That's the night the Municipal Ownership League is to hold its first meeting. It is planned to hold the

crowd until midnight. Then the crowd is expected to offer three-cent fares on all the lines radiating from Memorial Hall, and refuse to pay more."

And further:

"It is intimated that at the meeting of the Central Labor Union of Thursday night resolutions will be approved calling on all labor union men to attend the mass meeting on Friday night. These men *may furnish the sinew to see to it that three-cent fares are accepted by the conductors* after the new ordinance becomes effective."

And on the editorial page was found the following:

"And now the railway crowd has taken the franchise into the United States court. That means, practically, that the rights of the people of Toledo will be placed in the hands of a two-legged human being who happens to be a federal judge.

"Just what kind of a judge this particular judge may be, and just what kind of a two-legged human being he is, we don't know. But the fact that he is a judge, and a federal judge at that, doesn't make him any more or less of a man than he was before he went on the bench.

"So the people's rights here will depend largely upon how his mind works, and whether he thinks in straight lines or around corners. Anyhow, whether he is a great big man or a little bit of a man, he will have a whole lot to say in finally determining the argument between the people of Toledo and the bond and stock gamblers and speculators."

The attacks continued from time to time, and finally on September 11th the following appeared in the paper:

> "*Killits Accuses John Quinlivan of Contempt. Basis of Charges Against Union Leader.*
>
> "These are the remarks alleged to have been made by John Quinlivan, and on which Judge Killits bases his contempt charge.
>
> "The street car situation of Toledo is in the hands of a friend of the Rail-Light.
>
> "Judge Killits has demonstrated from the first that he was at all times favorable to the Rail-Light.
>
> "Any fair-minded citizen will see that when Killits placed the burden of proof of the Schreiber ordinance on the city that the city was going to be the goat. The Central Labor Union should adopt stinging resolutions and let our federal friend know what we think of him.
>
> "The burden of proof should have been placed on the Rail-Light. Killits and the press are preparing to hand the people a lemon. They are unfair to the people.
>
> "Impeach Killits."

And finally on September 17th the newspaper had this to say respecting Judge Killits:

> "*The News-Bee and Judge Killits.*
>
> "As we see it the public interest in the contempt proceedings instituted by Judge J. M. Killits against the News-Bee and Managing Editor Howard, depends not so much on what the judge sees fit to do or not do, as it does upon

how his actions may affect the policy of the News-Bee.

"It has been the policy of this paper in the past to discuss frankly and fearlessly all questions of public policy and interest. And without regard to whether our statement of the truth, as we see it, pleases or displeases this, that or the other citizen—even though that citizen happens to be what is commonly known as a judge.

"We have no desire to influence the conduct of any judge in interpreting the law in any particular case. And we have no intention of permitting any judge of any court to influence our judgment in defending the public interest.

"We don't want to censor judicial decisions, and will not permit judicial censorship of the News-Bee's editorial policy.

"We have notions of our own about contempt of court. One of them is that nobody but the judge himself can inspire public contempt of the court over which he happens to preside.

"The people of this country, because of patriotic education from early youth, start out with respect for our federal courts. When that respect changes to contempt, it can be only because of the conduct of a judge or judges.

"We have said before that after all, Judge Killits is no more than a two-legged man like any of the rest of us. We repeat it for the sake of emphasis. No judge judges by divine right even though he holds his job for life.

"No judge is infallible or omnipotent. No physical or mental change takes place when he is lifted from the practice of law and placed upon the bench, that transforms him from a human being into a god.

> "And what kind of a judge he turns out to be depends almost altogether on the kind of a man he was beforehand.
>
> "We shall not discuss now the merits of this particular case. We do not discuss cases while they are pending with any purpose of interfering with the administration of justice.
>
> "We prefer to give every judge free rein to make either a Solomon or monkey of himself, if either be possible.
>
> "But once the case is decided, we shall say and publish whatever we think best for the public good, whether it pleases or displeases any judge—even if that judge happen to be John M. Killits."

This court then referred to another contention of the appellants in the Toledo case that there was no proof that Judge Killits was influenced in his purpose to do his duty. This court answered that contention as follows:

> "Again it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publication, and therefore there was no proof tending to show the wrong complained of. But here again, not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test."

It is, of course, freely admitted by this appellant that if it had been proven that any one of the operatives of the Burns Agency or anyone else acting on behalf

of the defendants in the criminal case, or, in fact, any person made contact with any of the jurors or approached them in any way, or sought to influence them in their duty, that such act would amount to contempt of court, even though the juror approached would be strong enough to resist any temptation or a suggestion which might have been made by such person to him. This rule of law has been announced time and time again by the Court of Appeals of the District of Columbia and lately in the Lombardo case, *supra*. We have no such situation here.

If in their admitted shadowing of the jurors in the Fall Sinclair case the appellants had intimidated any of the jurors or had attempted to bribe or to influence them by threats in their decision of the issues in that case, admittedly the acts would have constituted contempt. It was so held in the case of *McCaully vs. United States*, 25 App. D. C., 404, where the defendant was adjudged guilty of contempt for going to a juror's house, and later getting the juror to call at his place of business in order to talk with him about the case, and to try to influence him to decide it in favor of the defendant. Similarly in *Pierce vs. United States*, reported in 37 App. D. C., 582, Pierce was declared in contempt for approaching a member of the grand jury and attempting to corruptly influence his action in a case then pending before the grand jury. And the same was held in the recent Lombardo case in the Court of Appeals of the District of Columbia. Of like import is the case of *Russell vs. United States*, 255 U. S., 138; 65 L. Ed., 553, where the de-

fendant actually attempted to bribe a juror, the offer to bribe being delivered to the juror's wife. It is important to note, however, that in every one of the cases reported in the Federal courts where persons have been held guilty of contempt for attempting improperly to influence or intimidate jurors, direct contact had been made with the jurors and a direct attempt made to influence them.

See also

Savin vs. United States, 131 U. S., 150.
Cuddy vs. United States, 131 U. S., 154.

But the line of demarcation is plain between the cases cited above, where the juror or the subject knows that he is being approached, and those cases where an attempt is made, but where there has been no direct contact with the juror, for instance: In *Carroll vs. United States, supra*, it was held that an attempt to influence a juror which only reached a third person, who refused to communicate the attempt to the juror, did not constitute contempt; and in *Domphan vs. Lehman, supra*, that conspiracy to commit contempt is not contempt. Somewhat analogous is the case of *People vs. Weiler*, 179 N. Y., 46; 71 N. E., 462, where the defendant, a private detective, shadowed the complainant for four or five days, but in such a manner that the complainant did not know it at the time. The detective was charged with having committed a crime under a statute making an "offensive or disorderly act" a misdemeanor and punishable as such. But the court held that under this evidence there had been no

offensive or disorderly act, and that there had not been any damage sustained by the person shadowed, even though he suffered a natural feeling of annoyance after being informed by others that the shadowing had taken place. And in *Chappell vs. Stewart*, 82 Md., 323, the court refused to grant an injunction to restrain shadowing by a detective employed for that purpose. Similarly in *People vs. Clark*, 164 N. Y. S., 137, which was an action against a detective agency for shadowing, the court said:

> "Being shadowed by a private detective is certainly annoying, but if the courts are to hold that it is illegal, the Legislature must pass a law *to that effect.*"

Not only must it be shown that contact was had with one of the jurors, but there must have been an attempt also to corrupt or influence the juror—some indication of how the party approaching the juror desired the case to be decided; and we submit, that even had it been shown that any one of the jurors were conscious of the surveillance (of which fact, however, there is not the slightest evidence), there could be no contempt of court, unless the juror knew who it was that was shadowing him, or at least what was desired of him, and so forth; in other words, there must have been some attempt to corrupt or influence him. Suppose a person approaches a juror in a case and goes so far as to say "I am interested in the case. How is it progressing?" This has been held not to constitute contempt of court. In the case of *Castleman vs. Conti-*

nental Car Co. (Ky.), 238 S. W., 658, the defendants employed a detective agency to assist in the selection of a jury to try the case, and one Hager, head of that agency, not only assisted in the selection of jury, but attended the trial and conversed with one of the jurors during the trial. It was admitted by him that he did make inquiry of one of the jurors as to whether the case had been decided by the jury, but, upon being informed that it was not, ceased his conversation and made no further reference to the case. Upon the review of the case on appeal, the Appellate Court said:

> "The facts disclosed by the record concerning this matter are not sufficient to justify the positive conclusion that any improper conduct was engaged in by Hager or any one connected with his detective agency though the evidence proves some opportunities therefor. However, it is proper to state that there is absolutely no fact appearing in the record remotely or otherwise connecting defendant's counsel with any misconduct of the detective agency, if any."

See also:

Harwell vs. State, 78 Tenn., 544.

Ex parte Wright, 64 Tex. Cr. Rep., 171.

Judged by the principles which determine the question of liability for contempt in the Federal courts, it is plainly evident that if no juror in the Fall-Sinclair case actually knew that he was being shadowed by any agent or employee of the appellants, or any of them, and his vote as a juror was not being solicited in be-

half of such appellant or appellants or their principal, the act of shadowing could not possibly have any effect, directly or indirectly, upon that juror's conduct or upon the orderly administration of justice.

But even if it be assumed (for purposes of this argument alone) that the motives of the appellants were improper and that they or their employees hoped to use the information which was, or might have been, obtained in the "shadowing" for the purpose of improperly influencing some member of the jury, the appellants, while guilty perhaps of a *conspiracy* to obstruct justice, could not by any possible stretch of the imagination be said to have committed an act *tending* to obstruct justice. They would have done no more than if they had simply sat in the court room during the Fall-Sinclair trial and looked at the jurymen, hoping to discern from a study of their faces whether any of them would be good subjects for an attempt to bribe. A juror who is unaware that he is being shadowed, or that he was wanted to help one side or the other, cannot possibly have his actions influenced by the shadowing, and the orderly administration of justice cannot be in the least degree obstructed thereby. The act of shadowing, then, cannot be an act of contempt of court within the meaning of Section 725 of the United States Revised Statutes, unless the jurors, or some of them, knew of the act and of the specific purpose of it.

No single juror testified that he knew he was being shadowed, or that he even suspected that he was being

shadowed by agents or employees of the appellant. The Burns operatives themselves, called to the stand one after the other to testify on this subject, declared that they had received explicit instructions from their employers not to approach any juror or to let any juror know that he was being shadowed. The Burns Detective Agency so conducted the operation as to exclude any possibility of any disclosure of the investigation being made to the subjects. Operatives were changed at frequent intervals in order that the jurors might not become suspicious at having seen the same face too frequently. At the risk of losing their subjects, which frequently happened, the operatives were instructed to, and did keep a substantial distance away. The entire operation was carried out in such a manner that not one of the twelve men and women who sat on the Fall-Sinclair jury testified that he or she knew or apprehended any shadowing which might or could have affected them in any way in their duties as jurors. If, then, the acts of surveillance which the Burns agents performed in this case were so conducted that no one of the eleven jurors who were shadowed knew the shadowing was taking place, the fact that these acts did not reach the minds of any single juror is the best possible proof that such acts did not reasonably tend to reach their minds. In no single instance did it operate in part to obstruct justice or to reach the consciousness of the person shadowed.

Point III.

The Trial Court Erred in Admitting Evidence of the Operatives' Reports.

The law being as shown in the preceding sections of our argument, it follows necessarily that the trial court erred in admitting in evidence the original and carbon copies of the reports of the Burns operatives. These reports were sent to the appellant Day and to this appellant. They went no further. Neither members of the jury nor the court saw them. No juror knew of their existence. In no way did they even indirectly tend to obstruct the administration of justice. The trial court likewise erred in admitting evidence concerning the alleged falsity, incorrectness or inaccuracies of these reports. That is a matter that concerned only the respondents and the operatives. Of like import was the refusal to strike out the O'Reilly report of October 29, 1927 (Government's Exhibit 170), concerning juror Kern. That report was never sent to nor seen by this appellant. Nor was it made under his instructions or with his knowledge. In fact, those who made it realized that it was without the scope of their instructions. When these reports were offered no promise was made to follow it up with proof that the jurors or any of them knew of these reports or their contents, or of the purpose in mind in the shadowing, nor was any such proof thereafterwards attempted.

Point IV.

The Trial Court Erred in Not Admitting Testimony as to the Intent of This Appellant.

It is only because the trial judge in his opinion spoke of "sinister" intent of this appellant and the others that error is claimed in the refusal to admit testimony that W. Sherman Burns did not, when he sent C. G. Ruddy to the respondent, H. M. Day, intend to turn the Burns Agency over to Day for him to do with it as he pleased. Counsel contended then and contend now that intent in contempt cases is of no import, but as the court below considered it, it is respectfully submitted that this appellant should have been allowed to introduce testimony showing there was no improper intent.

If shadowing of a jury is *per se* contempt of court, then this appellant, W. Sherman Burns, admits his liability; but under no other theory can he possibly be guilty of contempt of court. He happened to be the officer of the Burns Agency who contracted with Mr. Day and his principal, Mr. Sinclair, concerning the surveillance. His instructions were definite and the scope of the work was positively limited by him to pure surveillance. Moreover, he took every precaution to see to it that his understanding as to the nature and the extent of the work was correct. This is evidenced by his insistence that Ruddy call him on the telephone after Ruddy had had his first discussion with Mr. Day about the surveillance. From that time until the

termination of the surveillance he had nothing whatever to do with it. He saw no reports of any of the operatives and the only matters that came to his attention during the whole time were purely formal business matters affecting the expenses of the work in the nature of reports of expenses sent to the office from time to time by Mr. Ruddy. He had nothing whatever to do with the making of the affidavit—in fact, did not know of its existence until after it was executed and filed with the Clerk of the Court by Mr. Justice Siddons. It was freely admitted by the District Attorney conducting the contempt proceeding that this defendant cooperated with him in every way to bring before the court and the Grand Jury investigating the matter all of the facts and documents within this appellant's knowledge and control.

When this defendant accepted the employment on behalf of the Burns Agency—as an officer only of that corporation—there were no decisions of any court, nor any ruling of any governmental agency or department that would induce him to believe for a moment that the surveillance of a jury was unlawful. Indeed, as we have herein elsewhere shown, the practice of the Department of Justice, well known to this appellant, would prompt him to believe that such surveillance was proper.

The trial justice did not find as a fact that any of the jurors were approached by the operatives or were conscious that they were being shadowed. The Court of Appeals in the certification in this case says, "The evidence does not disclose that any of the operatives were instructed to approach, or approached, the jurors,

nor does it disclose that any juror knew that he was being shadowed."

The record amply supports the foregoing finding of fact by the Court of Appeals concerning the effect of the surveillance on the members of the jury; and the Government's contention made at the trial below and in the Court of Appeals that the jurors were aware of the surveillance, is without any basis of fact. But even if the jury were approached, which we do not for a moment admit, and even if the construction which the Government seeks to put upon the visit of O'Reilly to Kidwell's house and the investigation of Kearn's financial responsibility is proper, with which construction we most certainly disagree, nevertheless, this appellant should not, we submit, be held accountable for such acts of the operatives and servants of the Burns' Agency for the reason that such acts were not only beyond the scope of their employment, but in the very face of the instructions and directions given in good faith by this appellant.

It can not be said that the mere surveillance of a juror which does not contemplate in the slightest any contact with, or consciousness on the part of, the juror, is an unlawful thing—is a criminal act. In the many thousands of decisions of the courts of the United States and England, touching on every variety of acts of conduct, there is not one that condemns, in terms, the surveillance of a jury. In no order issued by governmental authority in this country or England is there to be found a prohibition of shadowing jurors. So it must be conceded that when this appellant, acting as an officer of the Burns Agency, directed this surveil-

lance to begin, and threw around it all the safeguards with which it was possible for him to protect it, he was entering, in his official capacity, into a lawful enterprise and the thing he directed the servants of the Burns Agency to do was a lawful thing and not a crime or offense against any law of the United States.

It is not proper, we submit, to apply to the conduct of this appellant, the doctrine of *respondeat superior*, as if this were a civil case.

It is freely conceded that there is respectable authority to the effect that, in respect to the so-called illicit liquor traffic and similar cases, such as, for instance, those involving the sale of liquor to minors and on Sunday in violation of enactments passed many years ago under the compulsion of the early movement towards prohibition, the master is held liable for the wrongful act of the servant, notwithstanding such act was not only done without the master's knowledge and consent, but against his directions. The great evils which such statutes sought to correct forced the harsh rule that applied the doctrine of *respondeat superior* to such cases. As was very aptly observed in *O'Donnell* vs. *Commonwealth*, 108 Va., 882, the doctrine was based upon the postulate that a man who engages in that sort of business as a licensee of the State does so at his peril and must see to it that his servant rigidly complies with the requirements of the law. From these decisions has been developed the principle that with respect to offenses *mala prohibita*, as distinguished from those *mala in se*, the doctrine of *respondeat superior* applies as in civil cases. By no means, however, have all the courts followed this rule, even in the illicit

liquor traffic, gambling and pure food cases. The following are a few of the many cases in which the applicability of the doctrine was denied:

Neideser vs. State, 6 Baxt., 499;
State vs. Mueller, 38 Minn., 497;
Lathrope vs. State, 5 Ind., 192;
Minden vs. Silverstein, 36 La. Ann., 916;
Commonwealth vs. Stevens, 153 Mass., 421;
Commonwealth vs. Wachendorf, 141 Mass., 270;
State vs. Neal, 133 N. C., 689;
Anderson vs. State, 22 Ohio State, 305;
Commonwealth vs. Johnston, 2 Pa. Sup. Ct., 317;
Wadsworth vs. State, 351 Tex. Crim. Rep., 584;
Commonwealth vs. Nichols, 10 Met., 259;
Commonwealth vs. Dunbar, 9 Gray, 298;
Commonwealth vs. Riley, 196 Mass., 60;
Kittrell vs. State, 89 Miss., 666;
Rosenbaum vs. State, 24 Ind. App., 510;
Bean vs. State, 72 Ark., 368;
Hanson vs. State, 43 Ind., 550;
Thompson vs. State, 45 Ind., 495;
Commonwealth vs. Rooks, 150 Mass., 59;
Patterson vs. State, 21 Ala., 571;
Boatwright vs. State, 77 Ga., 717;
Gaiocchio vs. State, 9 Tex. App., 387;
State vs. Burke, 15 R. I., 324;
Wetzler vs. State, 18 Ind, 35;
Pennybaker vs. State, 2 Blackf., 484;
State vs. Baker, 71 Mo., 475;
State vs. Meagher, 49 Mo. App., 571;
People vs. Utter, 44 Barb., 170;
Hipp vs. State, 5 Blackf., 149.

Nor has the rule found universal application in England. Lord Coleridge in *Somerset vs. Hart*, L. R., 12 Q. B., Div. 360, gives a reason for the rule and the limits of its application as follows:

> "I quite agree that the provisions of an act which is passed in the interest of public morality and order should receive a reasonably liberal construction. I do not say that proof of actual knowledge on the part of the landlord is necessary. Slight evidence might be sufficient to satisfy the magistrates that the landlord might have known what was taking place if he had pleased, but where no actual knowledge is shown, there must, as it seems to me, be something to show either that the gaming took place with the knowledge of some person clothed with the landlord's authority, or that there was something like connivance on his part that he might have known, but purposely abstained from knowing."

And to the same effect is *Chisolm vs. Doulton*, L. R., 22 Q. B., Div. 736.

While criminal contempt of court is *sui generis* and can neither be called *malum in se* nor *malum prohibitum*, there is manifestly more reason in applying to it the same rule as applied to offenses which are *mala in se*. On principle, we submit that it is better logic to follow in this case the rule that the master is not liable for the wrongful acts of the servant, where the servant is engaged in a lawful enterprise, or where he is not employed by the master in an unlawful undertaking, but where he departs from the master's

instructions, and without the master's knowledge and consent, commits wrongful acts.

Certainly, criminal contempt of court is not *malum prohibitum*. It is not an offense created by any statute. What enactments there are concerning criminal contempt are merely declaratory of the existing law, as was said by Chief Justice White in *Toledo Newspaper Company vs. United States*, 247 U. S., 407; 62 L. Ed., 1181.

The Court of Appeals of the District of Columbia in *Re Gompers*, 40 App. D. C., 293, 322, said: "Contempt of Court is not a statutory crime in this country." While the opinion of the Court of Appeals in that case was reversed by the Supreme Court in *Gompers vs. United States*, 233 U. S., 604, 610, 611, it was not reversed in so far as the Court of Appeals of the District of Columbia declared that contempt of court was not a statutory offense. Indeed, the opinion of the Supreme Court fortifies and strengthens the opinion of the Court of Appeals in that regard and goes further when it says:

> "It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statutes, offenses, because trial by jury as it has been gradually worked out and thought out, has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be

proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S. p. 147 (1885), and that, at least in England, it seems that they still may be and preferably are tried in that way."

We feel that we should close this particular phase of our discussion, as we began it, with the statement that after all, there is not the slightest evidence in the entire record that any juror was ever approached by any one connected with the appellants or that any members of the jury were ever conscience of ever being shadowed.

POINT V.

The Trial Court Erred in Admitting Evidence of Things Done After the Mistrial of the Fall-Sinclair Criminal Case and When There was no Cause on Trial Before the Court.

It has been clearly shown that there can be no act of contempt of the character of that with which this appellant is charged, unless there is a cause on trial in court. Therefore, it is clear that the trial court erred in admitting in evidence things said and done by, and the conduct of this appellant after the discharge of the jury.

POINT VI.

The Trial Court Erred in Not Admitting Evidence that there was no Consciousness of the Surveillance in the Mind of Any Juror.

The Government used every conceivable effort to prove consciousness of the surveillance on the part of

some of the jurors. The Government failed utterly to prove it, although the court gave the Government every latitude in its attempt. Notwithstanding, the trial court refused to admit evidence on behalf of appellants that immediately subsequent to the dismissal of the jury in the Fall-Sinclair trial all the jurors therein had stated one to the other and agreed among themselves that at no time during the Fall-Sinclair criminal trial were they conscious of being shadowed or followed. This was error most prejudicial to this appellant.

POINT VII.

The Trial Court Erred in Admitting Evidence of Acts of Persons Not Shown to be Connected With any of the Appellants or With Those Acting in Their Behalf.

It is submitted that the trial court erred in admitting evidence concerning the suspicion of juror Herzog that during the Fall-Sinclair trial he was on one occasion followed by some one, and the testimony of juror Bailey to the effect that on one occasion on October 28, 1927, during the Fall-Sinclair trial, she was observed by some unknown person, and in admitting the testimony of juror Kidwell concerning an incident in the Museum Grounds and an incident at the west end of the Court House, both alleged to have taken place during the Fall-Sinclair trial, for the reason that none of the appellants, nor any one in their behalf, were shown to have known about such incidents or had anything to do with them.

For like reason, the court erred in admitting testimony of a conversation in the petit jury room between jurors Heaton, Bailey and Kidwell during the Fall-Sinclair trial (Rec. 491). The error of the court in view of the argument now made by the Government is all the more apparent. The Assistant District Attorney in the trial below adduced evidence over the objections of the appellants to the effect merely that a conversation took place between several of the jurors in the jury room on the "subject of being watched or being shadowed." An examination of the Record will show that he was extremely careful in having the witnesses testifying about this particular matter limit their testimony merely to the fact that there was such a conversation. He was careful to ask none of the witnesses what was said and it is a conclusion from which there is no escape that had the conversation been to the effect that the jurors thought they were being shadowed or watched by some person or persons, the Assistant District Attorney would have been certain to have brought out that fact. And it follows necessarily that the conversation was not to the effect that the jurors thought they were being shadowed. Exactly what was said no one knows except the District Attorney. It might have been that the jurors stated they did not think they were being shadowed or they may have speculated about being shadowed by the Government. The conversation may have taken any turn wherein the subject could have been one of surveillance or shadowing. Indeed the conversation might have been prompted by the occurrence at the west end of the court house when an unidentified man (in nowise

connected with the appellants and who might innocently have been asking about the trial) approached Kidwell. The evidence should not have been admitted; and at any rate it does not in the slightest show that the surveillance as conducted by the Burns Agency penetrated the consciousness of any of the jurors.

The testimony of Britten Browne, Robert Dove, Mrs. Rawzee, Carl S. Anderson and Donald Woodward concerning an investigation of the property of juror Kern showed distinctly that it was an independent investigation, unknown to the Burns Agency, or any of its agents or employees. For that reason it is submitted that it was error to refuse to grant the motion to strike out this testimony as to the Burns respondents.

Point VIII.

The Trial Court Erred in Limiting the Cross-examination of Frank J. O'Reilly, a Government Witness.

Counsel contend that the trial court erred in refusing to admit testimony on cross-examination of Frank J. O'Reilly, one of the Burns operatives, of what was actually said between O'Reilly and the father and mother of juror Kidwell, on the occasion of the visit of O'Reilly to the barber shop of the elder Kidwell; and to the home of the mother on the grounds that the subject of the conversation was opened up by the direct examination (Rec. 416, 428).

Point IX.

There Was No Contempt of Court Committed by This Appellant with Respect to the Preparation and Filing of the McMullin Affidavit.

In the first place, it is clear from the evidence that this appellant had nothing to do with the preparation and filing of the so-called McMullin affidavit. In the routine of business he returned the report made by McMullin concerning the actions of juror Glasscock, and upon which the affidavit was based, but there is no evidence that he knew why the report was desired. Indeed, all the evidence is to the contrary. He did not know of the preparation and filing until after Justice Siddons, himself, had filed it in the papers of the case. Then again he had every reason to believe the report of McMullin was true. There is nothing in the Record to contradict this. The trial Justice in his opinion places no blame upon this appellant for preparation and filing of the affidavit, but limits his condemnation to the appellant's father, W. J. Burns. Again it must be remembered that the trial justice himself filed the affidavit, and admitted that he had done so (Rec. 1, Addition).

But even if it could be said, by the wildest stretch of the imagination, that this appellant played some substantial part in the preparation and filing of the affidavit, knowing it to be false, nevertheless he could not legally, for such conduct, be adjudged guilty of contempt of court.

(1) The Falsity of the Affidavit Did Not Make Its Filing Contempt of Court.

The question as to whether or not the crime of perjury is also contempt of court was one in which there was for many years much confusion. Some courts held that perjury *per se* was contempt, while others took the contrary view. It remained for Chief Justice White, in delivering the opinion of this court in the case of *Ex parte Hudgins*, 249 U. S., 378; 63 L. Ed., 656, to state the law on this subject in such clear and unmistakable terms that all misunderstanding has been removed. The petitioner in that case sought by writ of *habeas corpus* to be discharged from a commitment for contempt for perjury alleged to have been committed in open court. He had been called as a witness for the purpose of proving the handwriting of one McMillan. Upon being shown a writing the witness testified he believed it to be the writing of McMillan as he had often seen his writing. Upon repeated prodding by the court, however, he refused to testify as to whether or not he had even seen McMillan in the act of writing, stating "I would not say I have not, but I would not say that I have." The court thereupon committed him for contempt, declaring that it was satisfied from his previous testimony that he was swearing falsely.

This court granted the writ of *habeas corpus* and declared that although the witness may have committed perjury, his conduct did not amount to contempt of court.

In delivering the opinion of this court, Chief Justice White declared that there was an "essential ingredient in addition to the elements constituting perjury under the general law which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment" for contempt. This essential ingredient, declared the court, is "the further element of obstruction to the court in the performance of its duty."

The following paragraph from the court's opinion contains a clear analysis of the distinction between perjury as a crime, and perjury constituting contempt of court:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case when the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt, there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this, see United States *vs.* Appel, *supra*. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either

> overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully, the power would result to impose a punishment for contempt, with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful, and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen, when called as a witness in a court, would be gravely imperiled."

Analyzed in the light of this authoritative declaration from this court, it is clear that the mere falsity of the McMullin affidavit did not make its filing a contempt of court. Even though the respondents had wilfully caused the false affidavit to be filed, knowing it to be false, there must have been some obstruction to the court in the performance of its duty before the act could constitute a contempt.

(2) The Filing and Publication of the Affidavit did not Constitute Contempt.

In the case of *Doniphan vs. Lehman, supra*, in which it will be remembered that Doniphan and Lehman were charged with contempt of court for having conspired to bring about a miscarriage of justice in a civil action to which they were parties, the respondent Doniphan, in furtherance of their conspiracy, had caused an im-

proper deposition to be taken for use in the case. This deposition was sent by mail to the clerk of the court who received it and filed it for use in the trial of the cause. After it was filed the deposition was published. It was never in fact actually used at the trial of the cause, as the conspiracy was discovered before the trial took place. The court, however, declared that neither the filing nor the publication of this deposition constituted contempt of court, inasmuch as it did not actually tend, in that case, to obstruct the administration of justice. In its opinion the court said:

> "The taking of such a deposition is not misbehavior in or near the presence of the court, nor does its mere taking tend to obstruct the administration of justice. Something more must be done than merely to take a deposition in New York in order to obstruct the administration of justice here. The misbehavior must be a hindrance or obstruction of justice, and, so long as the deposition is not used or offered to be used in court, it cannot be regarded as an obstruction to the administration of justice. It may never be used or offered for use in court. The filing of it in the clerk's office and its publication after such filing cannot of themselves be held to be misbehavior in or so near the presence of the court as to obstruct the administration of justice. It cannot be regarded an obstruction to the administration of justice so long as it is neither used nor offered for use in or near the presence of the court."

Under the authority of this case the *filing* of the false McMullin affidavit could not *per se* make the re-

spondents guilty of contempt of court. The filing of the affidavit did not tend in any way to obstruct the administration of justice in the Fall-Sinclair trial. The affidavit never having been used, and no action having been taken by the court as a result of this affidavit, its filing in court could not constitute a contempt.

(3) Since There was Nothing Pending Before the Court, the Preparation, Submission, or Filing of the Affidavit Did not Amount to Contempt of Court.

The Government, in its brief before the Court of Appeals, contended and no doubt will contend in its argument before this court, that when the McMullin affidavit was filed there was a proceeding pending, to-wit, an investigation of the surveillance by the Grand Jury of the District of Columbia. Such a suggestion was made for the first time in the Court of Appeals. The position of the Government in this respect is untenable.

The petition alleges the employment of the surveillance "for the following objects, that is to say:

> "To spy upon said jurors and each of them, to bribe, intimidate and influence said jurors and each or any of them, and to do anything calculated to interfere with and impede said jurors and each of them in the unbiased discharge of their duties in the trial of said cause, and to influence, pervert, impede and prevent said jurors in the discharge of their duties as jurors, and to impede, pervert, and prevent the due administration of justice in said court *in the trial of*

> *said criminal prosecution*, either by corruptly influencing said jurors to decide the issues of said prosecution in favor of the defendants *therein*, or to disagree as to said issues, by unlawfully spying upon the said jurors and each of them for the purpose of concocting false charges against one or more of the said jurors, in case such a course should seem advantageous to said defendants in said cause, *with a view of bringing about a mistrial of the cause aforesaid; or otherwise accomplish such purpose*" (Rec. 3 and 4).

Concerning the making and procuring of the affidavit, the petition states "the said William J. Burns returned to the City of Washington, in said District of Columbia, where he and the said W. Sherman Burns, *in furtherance of said designs of said respondents*, procured the making of a false affidavit," etc. (Rec. 5).

Nowhere in the petition is there any charge that the affidavit in any way related to the Grand Jury proceeding. Moreover, it was not filed for use before the Grand Jury. It was not asked to be used in connection with the Grand Jury investigation, nor was any such use made of it, nor was that course even suggested.

If the alleged false affidavit has any bearing at all it must be related to the Criminal Proceeding and to that alone; and we proceed now to discuss its effect in that line.

In the case of *Craig vs. Hecht*, 263 U. S., 255; 68 L. Ed., 293, this court was asked to review the commitment for contempt of one Charles L. Craig, Comptroller of the City of New York. Mr. Craig had written

and published a letter to Public Service Commissioner Nixon, wherein he had assailed United States District Judge Mayer because the Judge, in certain receivership proceedings then pending, had refused to appoint a co-receiver for the City of New York to manage certain of the metropolitan street railways. It is to be noted that while the order of the court which Craig criticized had been a final one with respect to the matter there decided, the cause in which the order had been passed was still pending.

This court declined to review the conviction of Craig for contempt on the sole ground that a review had been improperly sought by *habeas corpus*, and should have been taken by writ of error. The merits of the charge of contempt were not discussed by Mr. Justice McReynolds, who delivered the opinion of the court. However, in a concurring opinion, Mr. Chief Justice Taft proceeded to discuss the fundamental question whether or not an act of contempt had been committed by Craig in writing and publishing the letter criticizing Judge Mayer. Judge Taft declared that inasmuch as the publication criticizing the Judge took place after the matter with which the criticism had to do had been finally adjudicated, the carrying out of the court's judgment could not be thereby obstructed and the publication was not contempt. The following quotation is taken from Judge Taft's concurring opinion:

> "It is of primary importance that the right freely to comment on and criticize the action, opinions and judgments of courts and judges should be preserved inviolate; but it is also essential that courts and judges should not be im-

peded in the conduct of judicial business by publications having the direct tendency and effect of obstructing the enforcement of their orders and judgments, or of impairing the justice and impartiality of verdicts.

If the publication criticizes the judge or court after the matter with which the criticism has to do has been finally adjudicated, and the proceedings are ended, so that the carrying of the court's judgment cannot be thereby obstructed, *the publication is not contempt and cannot be summarily punished by the court, however false, malicious, or unjust it may be.* The remedy of the judge as an individual is by action or prosecution for libel. If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an impartial verdict, or in the carrying out of its orders and judgment, the court may, and it is its duty to protect the administration of justice by punishment of the offender for contempt." (Italics ours.)

See also:

U. S. vs. Southern Wholesale Grocers Assn., 207 Fed., 434.

Cornish vs. United States, 299 Fed., 283.

Viewed in the light of the three cases cited above, it is obvious that nothing which the appellant is alleged to have done in the matter of the false McMullin affidavit could constitute contempt of court. As the time the affidavit was handed to the court a mistrial in the Fall-Sinclair case had taken place, and the jury had been finally discharged. There was no action what-

ever remaining for the court to take with respect to that case, except to fix the date for the new trial, and the affidavit, relating to alleged conduct of government agents in the prior trial, could not possibly be held to have any tendency to affect or obstruct the administration of justice. Indeed, nothing was asked to be done with or about it. The affidavit was of no more effect in obstructing the administration of justice than if it had been filed among the papers of some ancient and long forgotten cause.

It is submitted that the case of *Ex parte Steiner*, 202 Fed., 419, which held that a Federal court has power to punish for contempt the making of false affidavits to be used in opposition of a motion for a preliminary injunction, which affidavits, in the absence of anything to the contrary, would be presumed to have been verified in the presence of the court, does not apply to the case at bar. *There the false affidavit was presented to the court during the pendency of the cause for the purpose of influencing the action of the court and the court was asked to use the false affidavit to assist it in reaching its conclusion in that particular case which was then pending.* Such an act naturally obstructs the due administration of justice. It is obvious that the two cases are clearly distinguishable on their facts.

Point X.

In View of the Rulings and Findings of the Trial Justice, He Should Have Allowed the Introduction of Evidence Concerning the Practice and Custom of the Department of Justice of the United States of Shadowing Juries in Criminal Cases.

From the very beginning of the contempt proceeding it was apparent that the trial Justice was laboring under an erroneous impression of what constitutes the law of criminal contempt. In overruling the motion to dismiss the petition he announced that the mere shadowing of a jury by the appellants, irrespective of the effect the shadowing had upon the jurors, amounted to a criminal contempt of court. He remained under this impression throughout the entire trial, and his opinion clearly indicates that he adhered to it in his final conclusions. The trial court seemed to feel that when the appellants decided to send the Burns operatives to Washington to shadow the jury in the Fall-Sinclair criminal case, they committed an offense against the dignity of the court—and for that reason a contempt of court.

If the trial Justice had applied to the facts adduced at the trial the correct rule of law, namely, that an act, in order to constitute contempt of court, must obstruct, or directly tend to obstruct, the administration of justice, there might have been some justification for sustaining the objection to the introduction of evidence concerning the practice and custom of shadow-

ing juries in criminal cases. But the Justice could not relieve his mind of the conspiracy phase of the case. He always felt that there was something, to use his language, "sinister about it all." It was the supposed "attempt," rather than what actually occurred, that controlled him and influenced his final judgment.

With this bent of the court's mind always manifest, it became highly desirable, if not necessary, for the appellants to show, as it was a fact, that even the United States Government itself, had, whenever it became in the opinion of its office necessary, indulged in the practice and custom of shadowing juries in criminal cases.

Of course this appellant admits that if what actually was done by the operatives of the Burns Agency did in fact obstruct or directly tend to obstruct the administration of justice, there would be no purpose in showing that the practice of shadowing jurors in criminal cases had continued so long in the Department of Justice that it had become a custom—in fact, a law. An innocent act can constitute a contempt of court, but only if it has the essential obstructive tendencies. On the other hand, a crime, no matter how offensive, cannot, without such tendencies, be the basis of an adjudication of contempt of court. But in view of the position which the trial court and the Government took, it was error, we submit, not to permit the evidence of the general practice of shadowing jurors in the Department of Justice.

If the witnesses had been permitted to testify, it would have been shown that for a great many years a consistent and universal practice and custom had

existed in the Department of Justice of the United States and by the United States Attorneys General, of shadowing jurors exactly in the same manner as that employed by the appellants. Testimony of a great number of witnesses was proffered by the appellants to prove this custom and practice, but was rejected by the court.

There is no law upon the statute books that inhibits the shadowing of jurors by those interested in seeing that the jurors are kept free from any contact or outside influence. On the other hand, the custom established in the Department of Justice has become a rule of conduct—in effect, a law.

It was said by Mr. Justice McLean in delivering the opinion of this court in the case of *United States vs. MacDaniel*, 7 Peters, 1, at page 14:

> "A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done

> that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future.
>
> "Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions."

Of like import is the language used by Mr. Justice Hughes in *United States vs. Birdsall*, 233 U. S., 223, 230; 58 L. Ed., 930. He said:

> "Every action that is within the range of the official duty comes within the purview of these sections. * * * To constitute its official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the department under whose authority the officer was acting. * * * Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. United States vs. MacDaniel, 7 Peters 1, 14, 8 Law Ed. 587. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the courts of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery."

The above was quoted with approval in the case of *Sears vs. United States*, 264 Fed., 257, 261.

The Court of Appeals of the District of Columbia has dealt with this same question, and held that in the absence of statutes, custom is well recognized; and in the case of *United States Shipping Board vs. Levensaler*, 53 App. D. C., 322, the court received evidence to establish the existence of the custom relating to shipping.

Attention is called to the case of *United States vs. Reindeer*, a case decided by the General Term in 1848 in the Circuit Court of the District of Rhode Island and reported in the 27th Volume of Federal Cases, the opinion being delivered by Circuit Judge Woodbury. It was a libel suit, the libel of the vessel under the Act of Congress of February 18, 1793; and involved the question of forfeiture because of the violation of the statute of the United States respecting fishing. The court said at page 761:

> "Usage can be proved also to explain whether a voyage has been properly pursued or not under an insurance. What course, in certain cases, it may be customary to sail; in what manner the trade may be carried on at anchor; and probably what fish can be captured without amounting to deviation, can all be proved *aliunde* the policy, and will protect the insured while acting within the usage. So, usage to construe a law in a particular case, is some evidence that the construction is right, or should remain. United States vs. MacDaniel, 7 Peters 1.

"But I do not despair of the libel on these grounds alone as they might be deemed in some respects novel, and are not necessary.

"Yet they appeal strongly to the court in favor of a liberal construction to protect a confiding class of people, who, in this case, did the acts complained of under the sanction, if not advice, of the officers of government themselves, that had the execution of this branch of the laws in their charge, and who did these acts in conformity to a custom construing these laws in that manner in those places, very uniformly from the period of their enactment.

"Nor do I dwell on the hardship to honest, plain men being visited by penalties for breaking laws when adhered to, as read and interpreted erroneously to them by public officers. That, however, furnishes a strong reason, by means of contemporaneous and long construction, to show that such a construction was a true one. The fact, too, of its open existence for such a length of time, rebuts any intent of citizens, by conforming to it, to do what is wrong, by such conformity, and is another powerful argument in favor of adhering to this construction. Thus Lord Ellenborough observes: 'It has been sometimes said, *communis error facit jus;* but I say *communis opinio* is evidence of what law is, not where it is an opinion merely speculative or theoretical, floating in the minds of persons, but where it has been made the ground-work and substratum of practice. (Citing English cases.) It becomes a very grave question, where law-makers and law-executors have long slept over conduct as if not a departure from the law, whether the construc-

tion should suddenly be changed and really innocent persons be ensnared and prosecuted by a new construction. *Adams vs. Jones*, 12 Peters, 210. *'Cotemporanea expositio est optima et fortissima in lege.'*

"Finally a construction so long and publicly prevailing, and this by the sanction of the local officers, and without any dissent by the Treasury Department, through instruction, correspondence or circulars, operate strongly in its support. * * * And it is fortified even by the silence of Congress itself, not legislating more specifically to prevent it, but knowing as it must, the view which its own officers and the community have taken of the proper construction of the existing laws. Nor does this conclusion violate what seems a true rule to reach the proper construction, and enforce the real design of the law; because under all the circumstances, what would appear to be the most appropriate course to settle, under the 32nd Section, the design or meaning of the words 'different trade or employment'? Surely to adopt a construction, not departing from what has long been sanctioned, unless a contrary one is inflexibly required by law; surely the broadest and most liberal views, to sustain what accords with usage, and what prevents a forfeiture when no penal intent has existed."

When there is no law upon the subject, but a long established usage and custom of the Government, and if a citizen follows that usage and custom, shall he be caught in the trap? Shall he be the first to whom the finger of condemnation is pointed? Have we reached

that point in our national life where it shall be allowed the Government the right to shadow juries whom its officers suspect, and the same right be denied the citizen?

THIS APPELLANT HAD KNOWLEDGE OF THIS CUSTOM WHEN HE ACCEPTED THE EMPLOYMENT FOR THE BURNS AGENCY.

Counsel are not claiming ignorance of the law, but knowledge of the law. Their position rests upon the proposition that this appellant, at the time he agreed to accept the employment from the appellant Day, on behalf of the appellant Sinclair, had knowledge of the fact that the Government had, for many years, been engaged in this practice; that it was the custom of the Government to place juries under espionage; and, knowing that that was the practice engaged in by the Government, and feeling in his own mind that it was the lawful thing to do, he therefore accepted this employment. It follows, then, that, for the reasons above given, it was error to refuse to admit testimony tending to prove that this appellant had knowledge of the practice of the Department of Justice of shadowing juries in criminal cases, before he accepted the employment by the appellant Day for the Burns Agency.

Point XI.

The Trial Court Erred in Admitting and Considering Testimony Relating to the Kidwell-King-Akers Incident, With Which the Appellants Had Nothing to Do.

The petition states that "the jury was finally discharged from further consideration of said cause and a mistrial declared *because of the fact* that sworn charges had been made against the said Edward J. Kidwell, Jr., one of the jurors, to the effect that he, the said Edward J. Kidwell, Jr., while said trial was in progress, to wit, on the 29th day of October, 1927, outside of the courtroom where said cause was being tried, to wit, at No. 411 Four and a Half Street Southwest, in the city of Washington, in said District of Columbia, had made remarks in the presence and within hearing of J. Ray Akers and Donald K. King concerning his attitude and intended action as a juror aforesaid towards the issues on trial in said cause." One would expect to find in the petition an allegation of some connection between this incident and the conduct of the appellants. No such allegation is found. Nor is there any evidence in the entire Record of any such connection. What is a far more interesting inquiry is why neither Kidwell, King nor Akers were made parties respondent in the proceeding, and why the trial court and the District Attorney protected King and Akers, when the testimony of the Government disclosed that these two men committed the only contempt of court, and a very serious one at that?

The Government, by its testimony, proved that King and Akers had planned to meet Kidwell to make him talk about the case, and did so meet him and talk to him, and gave him intoxicating drinks in order to make him talk. The introduction of this evidence was strenuously objected to by counsel for the appellants on the ground that it was irrelevant, incompetent, and immaterial, in that it was in no way connected with any of the appellants or their agents, and that the appellants were in no way responsible, legally or morally, for the acts of Akers and King. Nevertheless the testimony was admitted. Then it was brought out by the testimony of King himself that he was in no way acting for any of the appellants when he planned with Akers to meet Kidwell, but was acting solely in the capacity of a newspaper reporter.

The testimony concerning the incident, briefly stated, is that King, a newspaper reporter, learning that juror Kidwell might be induced to talk, met an acquaintance of the juror by prearrangement, and both induced the juror by entering into conversation with him, and, as King brazenly admitted, by treating him to intoxicating liquor, to talk about the case, all of which, it is admitted by all parties, was done without the slightest knowledge, consent of, or for the benefit of any of the appellants.

Point XII.

The Trial Court erred in Restricting the Right of the Appellants to Discredit the Government's Witness McMullin, Both by Limiting the Cross-examination of the Witness and by Rejecting Testimony Concerning His Previous Life, and Relating to Fraudulent Acts of the Witness.

To the Government, at least, McMullin was at first an important witness. True it is, that there is not one word of his testimony that even approaches proof of any acts committed by the appellants or their agents that constituted contempt of court, but he was produced as a witness, and the appellants had the right to discredit him by the means recognized by the established rules of evidence.

The proffered testimony is discussed briefly in the statement of facts, and, inasmuch as McMullin was so completely demolished as a witness and so little consideration given to his testimony, it would serve no good purpose to restate that testimony. We do, however, cite a few cases bearing on the court's erroneous ruling.

A clear and comprehensive statement of the law on this subject is made in 28 Ruling Case Law, Section 197, at page 607. It is:

> "A question will not as a rule be allowed on cross-examination which is obviously irrelevant, but a witness may be cross-examined as to matters irrelevant to the issue in order to dis-

credit his testimony by what he himself may state in answer although not for the purpose of contradicting him by another witness. This is true regardless of the rule prevailing with respect to the scope of cross-examination as to matters directly material to the issue. Although as to these matters the cross-examination can not extend beyond the range of the direct examination, yet the fullest inquiry must be allowed into collateral matters, whether they have been the subject of direct examination or not. In fact, this line of inquiry is one of the most important purposes of cross-examination and is the principal factor in establishing cross-examination as one of the chief agencies for the development of the truth in judicial inquiries. By means thereof the relation of the witness to the cause or the parties, his bias or interest, if he has any, his character for truth and veracity, indeed any collateral fact which may bear on his truthfulness and impartiality may be brought to light. Any question may be put which reasonably tends to explain, contradict, or discredit any testimony given by him, or to test his accuracy, memory, veracity, or credibility. Cross-examination with a view to direct impeachment is not the limit of the right. Regardless of the rule prevailing in a jurisdiction as to the scope of cross-examination on material matters, it is always permissible on cross-examination to lay a foundation for impeaching the witness by proving prior contradictory statements, and where a witness admits the existence of a variance between his testimony and his statements on other occasions, to examine him as to the motives inducing the variance."

The case of United States *vs.* Wood, 4 Dak., 455, at page 473; 33 N. W., 59, which is particularly in point, is valuable in that it quotes a very illuminating section of Greenleaf on Evidence. The court said:

> "In 1 Greenl. Ev. 14th ed., the learned author, while recognizing the fact that the courts are not in perfect harmony upon the subject, uses the following very pertinent language in announcing a proposition of elementary law: "There is certainly great force in the argument, that, where a man's liberty or his life depends upon the testimony of another, it is of infinite importance that those who are to decide upon the testimony, should know, to the greatest extent, how far the witness is to be trusted. They can not look into his breast to see what passes there, but must form their opinion on the collateral indications of his good faith and sincerity. Whatever, therefore, may materially assist them in this inquiry is most essential to the investigation of truth; and it can not but be material for the jury to understand the character of the witness whom they are called upon to believe, and to know whether, although he has not been convicted of any crime, he has not in some measure rendered himself less credible by his disgraceful conduct. The weight of this argument seems to have been felt by the judge in several cases in which questions tending to disgrace the witness has been permitted in cross-examinations. * * * Nor does there seem to be any good reason why a witness should be privileged from answering a question touching his present situation and employment and associates, if they are of his own

> choice, as, for example, in what house or family he resides, what is his ordinary occupation, and whether he is intimately acquainted and conversant with certain persons, and the like; for, however these may disgrace him, his position is one of his own selection.'"

The above was also quoted with approval in the case of *State of Idaho vs. Loon*, 158 Pac., 233.

The same rule was applied in the case of *Tla-Koo-Yel-Lee vs. United States*, 167 U. S., 274, decided in this court. The opinion, given by Mr. Justice Peckham, is very short, and will be given in full, as counsel contend that it is decisive on the question. It is as follows:

> "This case comes here on writ of error to the District Court of the United States for the District of Alaska. The plaintiff in error is an Indian, and was indicted with another Indian, named Tak-Ke, and upon a separate trial, was convicted of the crime of murder in killing one August Jansen on or about the 5th day of January, 1894, at or near Shekan, within the Territory of Alaska and within the jurisdiction of the District Court thereof. He was thereupon sentenced to be hanged.
>
> "Upon the trial in the District Court it appeared that the authorities at Fort Wrangel, some 70 miles from Shekan, were informed by some Indians at that place in May, 1894, of the alleged murder of Jansen in the preceding January at Shekan. In July of that year the United States Commissioner, a deputy marshal and some others started from Fort Wrangel in a

steam launch, chartered for the purpose, and went to Shekan to find the body, if possible, and to take such other proceedings as were proper in the premises. An Indian woman, Tlak-Sha, voluntarily accompanied them for the purpose of showing where the body was to be found. A short distance from Shekan the party landed on the beach, and under her direction search was made, and the body of Jansen was discovered on the beach covered over with rock and brush. The body was sufficiently preserved to be identified, and it was recognized by some of the party. After the finding and recognition, the defendant, with the other above named Indian (Tak-Ke), was indicted for murder, and, upon the defendant's separate trial, the Indian woman was sworn as a witness. She testified that in January, 1894, the deceased was killed by the defendant and Tak-Ke, who was her husband; that they were in a small sloop near Shekan at the time of the murder, and there were present the deceased, three male Indians, herself and her child. The third Indian was named Ke-Tinch, and he was also sworn on the trial, and while differing in some of the details from the story of the woman, he corroborated her in the statement that the killing was done by the defendant and by the woman's husband, the defendant shooting the deceased and the woman's husband striking him on the head with an axe.

"The two Indians above named are the only witnesses to the killing. The female witness accompanied the searching party from Fort Wrangel, and with her assistance the body was found. As one of the two witnesses on the trial

she testified against the defendant and her own husband, who was indicted for the crime, though not then on trial. It is apparent how important it was to show to the jury, if possible, the bias, if any, of the witness against the defendant, or to show that her credibility was not to be depended upon by the jury.

"In the course of her cross-examination upon the trial the following questions were put to her:

"Q. Before this affair took place were you Tak-Ke's wife? A. Yes, sir.

"Q. Whose wife are you now? A. I am not married now.

"Q. Who are you living with now?

"Counsel for the prosecution objected to the above question as immaterial and incompetent. Objection was sustained by the court, to which ruling counsel for the defendant then and there duly excepted.

"Q. Is it not a fact that since your husband was arrested and convicted you have been living with this witness Ke-Tinch?

"Counsel for the prosecution objected to the above question as incompetent. The objection was sustained by the court and an exception taken.

"Q. Is it not a fact that shortly after this affair took place that you and the witness Ke-Tinch agreed to live together if your husband was convicted and you yourselves got clear?

"Same objection was taken, which was sustained by the court, and an exception taken.

"Q. I will ask you if it is not a fact that this defendant got so drunk (upon this occasion) that he was laid in the canoe and covered over,

and did not recover until after the body had been concealed? A. No, sir; he didn't get drunk; nobody drank.

"Q. I will ask you if it is not a fact that when he awoke and saw the sloop sailing away and asked where the sloop was going, that Tak-Ke told him the white man was sailing away?

"Objection taken to the question as incompetent, irrelevant and immaterial. Objection sustained by the court and an exception taken.

"We think answers to all these questions should have been permitted. The questions were directed to the purpose of showing material facts bearing upon the character and credibility of the witness, and the counsel for the defendant ought to have been permitted to proceed with his examination and obtain answers from the witness to that end. The two Indian witnesses (of whom the woman was one) did not agree in regard to the details of the alleged murder, and there is enough in the record to show that they were both of a low order of intelligence, and that they testified without any very solemn appreciation of their responsibilities as witnesses upon the trial of one individual for the murder of another. The whole occurrence at the time of the alleged murder is left in a good deal of confusion, and the credence to be given to the testimony of the woman was of the highest importance. * * *

"The judgment must therefore be reversed * * *."

This question is also very ably and very fully discussed by Circuit Judge Kenyon in the case of *Williams vs. United States*, 3 Fed. (2nd), 129, decided by

the Circuit Court of Appeals, Eighth Circuit, in November, 1924.

Point XIII.

The Findings of Law and Fact Made by the Trial Justice, in His Decision at the Conclusion of the Case, are Erroneous.

What we have heretofore said with respect to the court below laboring under an erroneous impression of what the true rule of the law in this case is, is apparent from a statement made by him in the early part of his decision.

After several general statements, His Honor said:

> "That the respondents here take the position that shadowing a jury, shadowing such as they admit in this case, is a legal right, harmless in its character, but if I have understood some of the contentions made here today aright, this right to so shadow, harmless as it is, changes its character if the fact of the surveillance shall be disclosed to those who are the subjects of it; not by contact, necessarily, but if their consciousness should be penetrated by the knowledge that such a legal right was being exercised, a harmless one at that, at once takes on a different character by the mere fact that it penetrates, in a given case, penetrates the consciousness of those who are subject to the surveillance. I find it quite impossible, applying logic and legal reasoning, to discover why an act alleged to be a harmless one provided it is not discovered, if it is discovered it becomes harmful."

Quite obviously the trial court overlooks the ruling in the Carroll case, and other like cases, where an attempt was made to influence a juror, but failed to reach the mark. From the beginning of the case to the conclusion the trial court was never able to distinguish between the attempt that never reached the consciousness of the subject, and an act or attempt which was brought home to the juror, and by that very fact had a tendency to obstruct or to interfere with his judgment and to obstruct the due administration of justice.

After quoting the section of the Judicial Code that is pertinent in this case, and discussing the comments of counsel in the arguments, the court continued:

> "And, indeed, I have rather got the impression from some statements made by one or two of the counsel for respondents in the arguments that this right claimed by them logically—and when I say logically I mean in accordance with the legal reasoning as well as the logic of logicians—that the right claimed by them has practically no limits at all and that it may include the court, the judge presiding in the court, or the judges; or if it can be done in the trial courts, it can be done with respect to the appellate courts of the country. No court would be free from the exercise of this claimed right of surveillance."

Here again the trial court was in error. It never was the claim of the appellants that they should be exonerated from blame, solely because they had the legal right to shadow a jury in which they were inter-

ested. Their real claim is and always has been that, irrespective of whether or not the act which they were charged to have committed was a crime or not, they cannot be legally adjudged guilty of contempt of court unless that act in itself obstructed or directly tended to obstruct the administration of justice. Of course, the appellants went further and showed, we respectfully submit, that what they did was not prohibited by law. This was made necessary, as we have shown before, by the bent of the trial court's mind as shown throughout the trial.

Then later we find this expression in the opinion:

> "And so I say again, as I said before, the claimed right here is, first, that it is a right; a right that may not be interfered with in its exercise. What is the right that is claimed? I am speaking now of the claim that respondents make in this case. It is a claim that they may establish such a surveillance of the jury, judge, prosecuting officer, witnesses. It is charged that all of that was done in this case. If it could be done, if the right exists, as claimed there, saying nothing about this right as some of the arguments in support of it allege, just so long as you conceal what you are doing, it is a right; *but once it is disclosed and penetrates the consciousness of those subject to it in some magical way, it becomes at once harmful.* I am unable to follow a contention of that character. I can only see in the assertion and in the exercise of a right such as this one that makes almost inevitably *and in and of itself when exercised an obstruction to the administration of justice.* And I am unable to escape

> from that conviction, and I, too, have meditated and reflected upon it as I am sure from the earnestness of counsel for respondents that they too have meditated and reflected upon it." (Italics ours.)

What the trial court meant to decide was, that as a matter of law the mere shadowing of a jury is "in and of itself, when exercised, an obstruction to the administration of justice." In other words: the shadowing of a jury was *per se* criminal contempt of court, and it made no difference whether the object shadowed was aware of it or influenced by its existence. Here again it is respectfully submitted the court was in error.

The trial court then discussed the morale of the alleged conduct of the appellants and made some general observations of the duty of courts to protect themselves against contempts of their authority. It is difficult to tell whether the trial court was of the opinion that the morale of the situation was controlling, and certainly we have no quarrel with him on the general proposition of the right of the courts to protect themselves from an obstruction of justice.

Then the trial court refers to the proffered testimony concerning the practice of the Department of Justice in shadowing jurors, and observed that such testimony was not in the case, which of course was, in a sense, correct, because it was improperly excluded, and then observed that the instances, the evidence of which was offered by the appellants, in which the jurors were shadowed by the Department of Jus-

tice agents were cases where the shadowing was done "with the consent of the court in which the jury was sitting." There is no basis at all for any such assumption. The trial court then followed with a few more general observations, and then considered the evidence respecting the coercion and intimidation of the witness Kidwell and proceeded to exonerate Mr. O'Leary, the Assistant District Attorney, of the way in which Mr. Kidwell was handled. As Kidwell was a government witness, and his testimony in the record does not disclose any act of the appellants constituting contempt of court, and since Mr. O'Leary was not on trial, it is surely not necessary to comment on the court's opinion respecting this phase of the case. Then motions were made to dismiss the petition, which were overruled, and the court then, at the request of counsel, took up the question of the part that appellant Wm. J. Burns took in the surveillance. As this particular part of the trial court's decision is treated in the separate brief of Wm. J. Burns, we pass that over and proceed to the discussion of the remainder of the trial court's decision.

After disposing of the defense of Wm. J. Burns, the trial court had this to say:

> "If it had not been for that surveillance, from aught that appears in this testimony, there never would have been a mistrial in this case, a surveillance that at least in part, together with the publication of the affidavit regarding it, but at least in part, necessitated a mistrial."
>
> "Now, what should be the proper penalty?"

Then followed exceptions to the finding of facts in the trial of the case. Then the trial court continued:

> "I do not want there to be any misapprehension at all about the Court's conclusions as they have already been announced. Dealing with all the evidence in this case, I did deal with all the evidence in the case in reaching these conclusions. Some plea has been made here this afternoon on behalf of these respondents; pleas that might be made at any time with respect to anyone who commits a criminal offense in the honest belief that he is doing something within his legal rights. We can not proceed to administer the law upon the theory that one did not know it was against the law. They may believe that it was not against the law. They may believe that it was a perfectly legal act, but if it be an act against the law their belief about the matter, or their ignorance of the law does not save them from the consequences of their act. I have said enough about the disastrous thing that has happened here in the breakdown of this criminal trial, a breakdown that from the evidence in this case is clearly attributable to the acts of these respondents. Clearly so. If they had not established the surveillance for aught that appears in this case, there would have been no breakdown of that criminal case, a case involving, no doubt, a great deal of money in its presentation; a great deal of money on both sides; the expenditure of a great deal of money on both sides. It broke down, and it broke down because of the surveillance of this jury. If it had not been, for aught that appears in this case, for the surveillance, there would

not have been the incident regarding the juror Kidwell.

He was not made a party respondent in this case. But there was the surveillance, and I do not care to go back over the record, but it is here in the record in connection with the views expressed here about the surveillance. Talk about an admonition because a man believed he was doing that which he thought he had a right to do! It is no answer to it at all."

What the trial court said, or attempted to say, was that because of the publicity given to the shadowing *after the mistrial and after the jury was discharged* made the shadowing an obstruction to justice. In the first place, the breakdown of the criminal trial was not due entirely to the fact becoming known. What really caused the trial court to discharge the jury was the affidavit of King that he had talked with juror Kidwell, in which conversation the juror had expressed his opinion about Mr. Sinclair and about what he, Kidwell, intended to do. That really was the primary cause for the discharge of the jury.

From all of the evidence—both of the Government and of the appellants—the appellants had nothing whatever to do with the King-Kidwell-Akers incident.

It cannot fairly be said that the surveillance was the cause of the mistrial. It may be that the publicity given to the surveillance by the attorneys for the Government who were prosecuting the Fall-Sinclair criminal case, and the publicity given to it by the court rendered a mistrial advisable, but these appellants had nothing whatever to do with such publicity. The pub-

licity was unnecessary. It is clearly shown from the Record that none of the jurors knew they were being shadowed. Messrs. Roberts and Pomerene knew for a week before the mistrial that the surveillance was going on and they did not see the necessity of making it public. To their minds it could not have been objectionable or improper, or they would not have permitted it to have existed a moment after becoming aware of it. They must have known when they were first apprised of the fact of the shadowing that the jurors were ignorant of the surveillance and we submit that it was not necessary for the trial court to have brought the surveillance to the knowledge of the jurors. Indeed, it is clear from the Record that if the Government's attorneys in the criminal case in the trial court had not given out the information concerning the surveillance, the jurors would have been, up until the conclusion of the criminal case, if not to this very day, ignorant of its existence.

It cannot, therefore, be said that the surveillance was the cause of the mistrial. The petition, while it alleges a mistrial by way of introduction, does not charge that such mistrial was an obstruction of justice or that the mistrial was declared because the jurors knew that they were being shadowed. In fact in the whole petition there is no allegation that the jurors knew of the surveillance. True it is, that the petition alleges that there was an attempt to prevent the due administration of justice by bringing about a mistrial, but the mistrial alleged in the petition was to be accomplished, not in the manner described by the trial court, but by corruptly

influencing the jurors to disagree among themselves as to the issues of the criminal prosecution or by "concocting false charges against one or more of said jurors" (Rec. 4).

And finally, there is no evidence in the entire case that there was a mistrial, or what the cause of the mistrial was, if a mistrial took place. The Government had opportunity to introduce in evidence in the trial below the record in the criminal case showing the mistrial and the causes therefor, but it refrained from doing so. So as the record now stands there is no evidence whatever that there was a mistrial. Certainly there is no evidence of the cause therefor. True it is that the petition alleges a mistrial and assigns causes therefor, but this appellant submits that such allegations are not evidence.

But, even if the surveillance had been the primary cause in the trial court's mind, it cannot be said that the shadowing of the jury caused the mistrial, or in any way obstructed justice. This obviously correct statement can be easily tested by the following supposititious case (we draw it along parallel lines with the Carrol case, for instance). Suppose that A had a brother being tried for a criminal offense and went to B, who happened to be acquainted with one or several of the jurors, and persuaded B to go to his friends on the jury and speak a good work for A's brother. Let us even suppose that A delivered money to B with which to bribe the jurors if necessary. Then let us suppose that for some reason or other B never attempted to bribe the jury, although he and A had actually con-

spired to effect the corruption of the jury; and suppose further that the conduct of A and B came to the knowledge of the trial judge in the form of an affidavit, and the judge, in reading the affidavit, immediately declared a mistrial. Would it then be permitted under the law for the trial judge to say, "If you had not conspired to corrupt the jury, the affidavit concerning your conduct would not have been made, and I therefore would not have discharged the jury. Therefore, your conduct has amounted to the obstruction of justice," or, to use the language of the trial court, if they had not established the conspiracy "for aught that appears in this case, there would have been no breakdown of that criminal case, a case involving, no doubt, a great deal of money in its presentation; a great deal of money on both sides; the expenditure of a great deal of money on both sides. It broke down, and it broke down because of the" attempt to corrupt the jury. This is exactly what was done in this case. The trial court did not find that the act of shadowing the jury, when and as it was being performed, obstructed the administration of justice, but it only did so because it came to the knowledge of the judge, and the judge, without any reason, we submit, declared a mistrial. The declaring of the mistrial was the act of the trial court. It may or may not have been justified by the conduct of Kidwell, but it certainly, from all the record, was not justified from anything which the appellants or their agents did. The trial court reasoned in a vicious cycle. He says in substance: "I declared a mistrial because your conduct was improper, and your conduct was improper because I declared a mistrial."

CONCLUSION.

This appellant contends that the trial court erred: (*a*) In not dismissing the petition and discharging this appellant at the commencement of the case, for the reason that the petition did not allege acts constituting contempt of court on the part of this or any other appellant; (*b*) that the record in the case discloses no facts showing that this appellant alone or in conjunction with any other person committed any act which obstructed or tended to obstruct the administration of justice, and, therefore, the court should have discharged this appellant either at the conclusion of the Government's case or at the end of the whole case; and (*c*) because the trial court, in its decision, made findings of fact wholly unsupported by the evidence, and conclusions of law that were erroneous, in that he held that the mere shadowing of a jury, independent of its obstructive or non-obstructive tendencies, constituted contempt of court, and in that he held that the discharge of the jury and the declaring of a mistrial was an act for which this appellant was responsible and hence amounted to contempt of court.

And the appellant respectfully submits that the judgment of the trial court should be reversed.

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APPENDIX.

The Proximate Consequences of An Act.

By Joseph H. Beale.

I.

"*In jure non remota causa sed proxima spectatur.* It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree."[1] The meaning of this maxim of Bacon is not clear. In medieval legal and philosophical Latin the word *causa* had four meanings: a thing or circumstance; a reason or excuse; a creative antecedent; a lawsuit. Of the examples given by Bacon to illustrate his maxim, not one is unmistakably a cause in the third sense; most of them are examples of the first meaning, and are to the effect that we do not look behind the immediate circumstances of an act to determine its nature. He allowed two exceptions: in case of "covenous acts" and of crimes. The former came before the chancellor, who was called upon by the terms of the bills to investigate precedent facts; and the example given of the latter was proof of the motive (a precedent cause in the second sense) to qualify the act.

Bacon was entirely familiar with the Aristotelian division of causes into four: the formal, the efficient, the material, and the final. He distinguishes these with respect to their importance.[2] The *final* cause,

[1] Bacon, Maxims, 1.
[2] 2 Nov. Org. Aphor., 2.

that is, the creative purpose, he says, "rather corrupts than advances the sciences, except such as have to do with the science of human action." The *formal*, that is, the result imaged by the creator, "is despaired of," There remain the *efficient*, that is, the active force, and the *material*, the passive condition upon which the active force works. These, he says, if they can be discovered only after investigation, are remote,[2] and "contribute little, if anything, to true and active science."[1]

In both passages Bacon seems to have the same thing in mind. He is combating the metaphysical tendency to go behind everything, and to find labored explanations for matters in themselves most simple; and he says that the law, having found the immediate physical causation, will not use metaphysical subtlety to distribute this causation among obscure distant antecedents. To use a modern analogue, if the law finds a man committing murder it will hold him for it, without taking time to find whether heredity or environment may not be more to blame than himself. Thus explained, the maxim is evidently not concerned with the modern problems of proximity or remoteness of result.

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[1] "Quales quaeruntur et recipiuntur, remotae scilicet."

[2] My learned colleague, Dean Pound, points out that Bacon was in this case combating the Aristotelian metaphysic, with its final cause; as Bacon says in another place, the physical causes are the efficient and material, the metaphysical are the formal and final causes. III. De Aug. Sci., 4. Fowler, Bacon's best and most sympathetic editor, points out his insistence upon the physical cause, 1 Fowler's Bacon's Nov. Org., 2 ed., 65, note 40, and finds in his opposition to the "remote cause" an example of his opposition to the theological and metaphysical form of reasoning—in other words, of the modern rather than the medieval turn of his mind. 2 Fowler's Bacon's Nov. Org., 2 ed., 2, note 13. Bacon's idea of the remote cause, therefore, was a purely physical idea; and he framed or found in the schools a maxim expressing the modern feeling, and asserted its truth in law; seeking for confirmatory examples in the Abridgements, and being perforce content with obscure, not to say remote, ones.

That Bacon's First Maxim was not recognized by lawyers before his time is clear from his examples. That lawyers for two hundred years after his time were uninfluenced by it seems clear from the authorities. No title, *proximate cause*, is found in any of the abridgments or digests before the end of the eighteenth century, nor has any reference to the maxim been noticed in any case before that time.

Meanwhile, however, the courts had been forced to deal with the problem of "consequential damage." It was enough at first to say, as Lord Holt did in *Roswell* v. *Prior*,[5] that "he that does the first wrong shall answer for all consequential damages." But it soon became evident that this responsibility must be somehow limited. The courts in laying down their limits were not agreed on the principle. While in *Ashley* v. *Harrison*[6] Lord Kenyon had said "the injury complained of was too remote," we find the idea expressed a few years later by Lord Ellenborough in *Vicars* v. *Wilcocks*[7] in the *dictum* that "the damage must be the legal and natural consequence of the words spoken." The first occurrence of the word "proximate" which has come to my attention—doubtless there were others earlier—was in the argument of counsel in *Ward* v. *Weeks*[8] many years later, where Sergeant Wilde said, "a man is liable only for the natural and proximate consequence of his actions, and not for remote consequences resulting directly from some intermediate agent." Greenleaf in the early forties, in his "Evidence," first clearly stated this principle in America: "The damage to be recovered must always be the

[5] 12 Mod. 636, 639. "Every one who does an unlawful Act, is considered as the Doer of all that follows." De Grey, C. J., in Scott v. Shepherd, 2 W. Bl. 892, 899 (1773).
[6] 1 Esp. 48 (1793).
[7] 8 East. 1 (1806).
[8] 7 Bing. 211,212 (1830).

natural and proximate consequence of the act complained of.'"[9]

One or two points may be noted here. First, there is in these cases no reference to Bacon's maxim; the earliest reference to this maxim which the author happens to have seen in any decision (doubtless there were earlier ones) was in *Scott* v. *Hunter*.[10] On the other hand, in many cases in which the subject was discussed at length the maxim was not mentioned.[11] It was reprinted in Broom's Maxims.[12] Second, that the court is here concerned with the consequences of an act, not with its cause; in very few cases up to the year 1909 is the proximity of the *cause* the subject of investigation. Third, that the courts do not use the word *proximate* alone, but in some combination, usually *natural and proximate*.

We have, then, to deal with a modern and gradually emerging principle that a person is responsible for the consequences of his act, but that responsibility is limited to such consequences as bear some sort of relation to the act. The serious study of this question by the courts has occurred only during the last fifty years; and by legal authors only very recently. The

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[9] 2 Greenl. Ev., 1 ed., 258 (1848). In Guille v. Swan, 19 Johns. (N. Y.) 381, 383 (1822), the Supreme Court of New York said: "Now, if his descent * * * would, ordinarily and naturally, draw a crowd * * * all this he ought to have foreseen, and must be responsible for."

[10] 46 Pa. 192 (1863).

[11] Harrison v. Berkley, 1 Strob. L. (S. C.) 525 (1847); Ivony v. New York Central R. R., 13 Gray (Mass.) 481 (1860); Gilman v. Noyes, 57 N. H. 627 (1876); Clark v. Chambers, 3 Q. B. D. 327 (1878).

[12] London, 1845; reprinted in Philadelphia in the widely used "Law Library." The fact that the earliest references in this country to the maxim are in Pennsylvania may perhaps be explained by the publication there of the American edition of Broom. According to Broom, the maxim had received no general application, but was "almost exclusively applied to" marine insurance.

summing up of the doctrine theretofore developed by Judge Smith in an earlier volume of the HARVARD LAW REVIEW[12] represents the most thorough examination of the subject yet made; and it is a rather striking fact that he ends where Bacon began; that the only "legal cause" is the efficient cause. It is submitted, however, that the matter cannot permanently be left there. Judge Smith himself did not regard his painstaking and scholarly work as final, but desired that his discussion should be the basis of further investigation. If it is true, as all agree, that the limitation of legal investigation to proximate cause or consequence is due to the impossibility of the court making a complete investigation and thus doing complete justice, the court, through some definite principle of law, should determine the general limits of proximity, and not leave it at large to the jury. It is the purpose of this article to suggest certain more definite principles of law by which the determination of proximity is to be regulated.

II.

The natural method of applying Bacon's maxim would be, to start with the consequence and work back to the cause. But as the law has actually developed, the method is reversed: we start with the human act and trace its consequences into a cause of action, and then trace further its consequential damage. This is a much simpler task. The causes of an event are all the preceding circumstances which brought the event to pass; and they are myriad. The consequences of an event, however, which still remain "efficient" are very few, and may easily be handled in an investigation.

[12] 25 Harv. L. Rev. 103, 223, 303.

The starting-point of any investigation of legal liability is some act or some non-action of a human being. But whereas an actor may always rightly be held to answer for the consequences of his act, since he has taken it upon himself to change the course of events, it is otherwise with a non-actor; he should be held responsible only if his failure to act was in itself a legal wrong, that is, if he had a duty to act. The non action of one who has no legal duty to act is nothing. It does not alter the course of events, and therefore it has no consequences. It is true that the omission of a legal duty also does not alter the course of events; but the non-actor, having been obliged by law to change events, is rightly held responsible for the consequences of not doing so.

Starting with a human act, we must next find a casual relation between the act and the harmful result;[*] for in our law—and, it is believed, in any civilized law—liability cannot be imputed to a man unless it is in some degree a result of his act. Imposition of liability, even that which seems most extreme, is yet based upon a causation by the defendant's act. Thus, liability of the owner for default of a pilot forced on him by a compulsory pilotage law is based ultimately upon the owner causing his vessel to enter port; liability for nuisance, however drastic, may be traced to the ownership of land; and liability of an employer under the Workmen's Compensation Act grows out of his carrying on the business.

Where the act is the failure merely of a legal duty, causation is established only when the doing of the act would have prevented the result; if the result would have happened just as it did whether the alleged actor

[*] Chicago, R. I. & P. Ry. v. Guthridge, 179 Pac. (Okla.) 580 (1919). This casual relation must be established by evidence, like any other part of the case. Ross v. Smith, 182 Pac. (Wash.) 582 (1919).

had done his duty or not the failure to perform the duty was not a factor in the result, or, in other words, did not cause it. Two typical applications of this principle may be given. In *Regina* v. *Dalloway*[15] it appeared that while defendant was driving carelessly, with the reins out of his hands, a child ran in front of the horses and was killed. Erle, J., charged that if by the utmost care on his part he could not have prevented the accident he must be acquitted. So where it was the duty of defendants to fence a hole they had cut in the ice of a lake, and plaintiff's horses ran away and were drowned through the hole, it was held that if any fence which defendant was obliged to build would not have stopped the runaways the defendant's failure was not a cause of the accident.[16]

This principle is illustrated by several recent cases. In *Piqua* v. *Morris*,[17] the embankment of defendant's reservoir broke away and the water injured plaintiff's land. The defendant had negligently failed to construct a sufficient spillway; but it appeared that the flood on this occasion was so extraordinarily great that a sufficient spillway would not have saved the embankment. The city's negligence was held not to be a cause of the loss. So in *Ford* v. *Trident Fisheries Co.*[18] where Ford, the mate, fell from the defendant's vessel and never rose to the surface, and the ship's boat was negligently lashed to the deck so that it could not be seasonably launched and used, it was held that, in the absence of evidence of the possibility of saving Ford, causation by the defendant had not been proved.

[15] 2 Cox C. C. 273 (1847).

[16] Sowles v. Moore, 65 Vt. 322, 26 Atl. 629 (1893).

[17] 98 Ohio St. 42, 120 N. E. 300 (1918). See to the same effect Montgomery L. & W. P. Co. v. Charles, 258 Fed. 723 (1919), where, however, the negligent act which was held not to have affected the result was one of commission.

[18] 122 N. E. (Mass.) 389 (1919).

Similarly in *Gutman* v. *Bronx Borough Bank*,[28] where plaintiff sent a check to her broker to keep good her margin on a falling stock, and defendant wrongfully refused to cash it, whereupon she was sold out, the court refused recovery unless it could be shown, by the course of the market, that otherwise she would not have lost both stock and check.[29]

It has been seen that an act which in no degree contributed to the result in question cannot be a cause of it; but this, of course, does not mean that an event which *might* have happened in the same way though the defendant's act or omission had not occurred, is not a result of it. The question is not what would have happened, but what did happen. A murdered man would have died in time if the blow had not been given; yet the murderer's blow is a cause of his death. A man would have died from a small dose of poison; yet if he was given twice as much, the entire amount of poison given him was a cause of his death.

Furthermore if two persons are active in bringing about a result, either by act or by wrongful omission, each act or omission is no less a cause of the result because the result might have happened exactly as it did though one of the persons had not acted, the cause attributable to the other having been sufficient to bring about the result. One might have caused the result, but in fact both did so. Thus where several persons, owning separate oil-wells, allowed oil to escape into a creek, where it became ignited and eventually burned plaintiff's building, each owner is a cause, and if the result is proximate all are equally liable.[30]

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[28] 188 App. Div. 664, 177 N. Y. Supp. 173 (1919).

[29] See also McMahon v. Western Union Co., 171 N. W. (Ia.) 700 (1919); Whitney v. Northwestern Pacific R. R., 178 Pac. (Cal.) 326 (1919).

[30] Northrup v. Eakes, 178 Pac. (Okla.) 295 (1919); Mummaw v. Southwestern Tel. & Tel. Co., 208 S. W. (Mo. App.) 476 (1918). The contrary decision in Gay v. State, 90 Tenn. 645, 18 S. W. 280 (1891), must be regarded as unsound.

A result is none the less attributable to the defendant's act or omission because it was followed or accompanied by a wrongful omission on the part of some one else. Thus, if it is the duty of two persons to do a thing and neither does it, the resulting injury is attributable to either failure.

Defendant had a duty to ventilate a mine; it was another's duty to inform him of any need for ventilation. Plaintiff was injured by lack of ventilation; the injury was a result of defendant's failure.[17]

Defendant was bound to supply a dry floor for workmen; another was employed to dry the floor by sanding. The floor being wet and not sanded, plaintiff slipped and was injured; this was the result of defendant's failure in duty.[18]

Defendant was bound to transmit a telegram to H asking for information for plaintiff; H was under an independent obligation to send the information and did not do so. Plaintiff's failure to get the information was due to defendant's failure to transmit the telegram.[19]

Defendant by his policy was responsible to plaintiff for loss of his vessel by perils of the sea. A seaman carelessly left a sea-cock open and the water coming in through it sank the vessel. The loss was by peril of the sea.[20]

III.

Granting that a certain event was the result of, that is, was caused by, a human act, the court will not necessarily follow the act into the result in question. The consequences of an act may be innumerable; to trace

[17] Reg. v. Haines, 2 C. & K. 368 (1847).
[18] Harwell v. Columbia Mills, 98 S. E. (S. C.) 324 (1919).
[19] Western Union Tel. Co. v. Huffman, 208 S. W. (Tex. Civ. App.) 183 (1919).
[20] Clarke v. Mannheim Ins. Co., 210 S. W. (Tex. Civ. App.) 528 (1919).

them would require infinite time and patience. Here, as in all affairs of life, it is necessary to reach a result which will secure to each interest the greatest amount of consideration which is compatible with an equal consideration to all other interests. To apply this principle to the question under discussion, the court can give to the tracing of the consequences of any particular act only its fair share of all the available time, considering the other acts which are waiting its attention. If, for instance, the court is called on to investigate the dropping of some substance, the court will watch it while it falls through the air; it will continue to watch it after it has fallen into an unstable or dangerous position; but as soon as it has reached a safe and stable rest the court will turn away to the investigation of some other act.[*] Its time is too short to spend in investigating apparently safe situations further. To use the common language in which this is expressed, the court will trace an act into its proximate but not into its remote consequences.

The rule that requires the exclusion of remote consequences is therefore a fundamental principle of law, based on the necessity of doing justice to all; and the question in any particular case, whether a given result is remote, is purely a question of law. This of course does not mean that the jury has no part in the determination of the question, which always involves the application of the law to facts, often quite complex. Particularly where the defendant's connection with the result is on the passive side the determination of the question involves the settlement of inferences of fact which are seldom so clear that the court can take the question away from the jury. But the rule of law which is to be applied to the facts must always be found by the court and given by it to the jury.

[*] Rex v. Gill, 1 Stra. 190 (1719).

This question has proved a puzzling one to courts and lawyers. It has already been seen that it first presented itself as a question of the limitation of consequences allowed to be considered; it became later confused with Bacon's maxim concerning "the impulsion of cause on cause," and a more serious confusion with negligence has frequently been noticed. The series of articles by Judge Smith greatly simplified the problem; a study of the subject as developed in criminal as well as civil cases has thrown light on the subject; and a conclusion as to the principles of law may be suggested. It is purposed in this article to suggest such principles, and to illustrate them largely by the cases decided in the last year and a half; so that this article in fact concerns itself with "the progress of the law" in the subject under consideration.

The study of proximate causation will prove to be a study of activity of force or of risk. A result is usually created by the impulsion of an active force upon a passive force; not necessarily, for it may be created by two active forces acting on each other, as by a head-on collision on a railway. Usually, however, but one active force is employed in bringing about a result. One active force at least is necessary, since nothing but an active force can bring about that change of conditions which we call a consequence. Furthermore, in so far as a passive force is traceable to a man it must be either (1) because that man caused it by an act which was an active force, the passive force being the spent form of the active force, or (2) because that man violated a duty to act upon it by an active force which he failed to apply. The whole problem may therefore be stated thus: when is one responsible for the operation (*a*) of an active force which he has created; (*b*) of an active force which acts upon a passive force which he created, or upon a passive force

which he was legally bound to change. Each time one or more active causes operate on a condition to create a new condition, a new causal step is taken, ending with the given result. This result is the direct result of the active force or forces which last acted upon the immediately precedent condition, and is the indirect result of the earlier acting forces. The active force which brings about the result without the intervention—the subsequent coming into action—of any other force is a direct cause of the result. All other forces are indirect. Every condition of what might be called the set stage on which the last active force acted is a precedent force; and of course no precedent force can operate to make a subsequent force remote.

We may therefore begin our investigation with the assumption that the immediate result of an active force is primarily the proximate result; and that if the principle of proximity is discoverable, it must be by some method of relating the defendant's act to the final active force. This final active force must be *prima facie* the "efficient" cause which Judge Smith in the article cited describes as proximate.

What, then, do we mean by proximity of result? Is the meaning a result that is physically direct, direct in time or place? Or is it logically direct, direct in causal sequence? There have been courts which urged the former view. The Court of Appeals in New York, in a series of cases dealing with the spread of fire, beginning with the Ryan case,[7] set a spacial limit to proximity of result. So eminent and sound a lawyer as Judge Cardozo felt obliged to assent to this view in a late case.[8] The case itself did not involve prox-

[7] Ryan v. New York Central R. R., 35 N. Y. 210 (1866).
[8] Bird v. St. Paul F. & M. Ins. Co., 224 N. Y. 47, 120 N. E. 86 (1918).

imity of causation, but the interpretation of an insurance policy. In the course of his interpretation the learned judge discussed the earlier authorities in the state on the subject of causation, and added that the view of causation there expressed, and apparently accepted by him,

"shows how impossible it is to set aside as immaterial the element of proximity in space. The law solves these problems pragmatically. There is no use in arguing that distance ought not to count, if life and experience tell us that it does."

It is submitted, with great deference (for Judge Cardozo is one of the author's judicial idols), that there is no such pragmatic sanction for the law of proximate causation. The passage is spoken entirely *obiter*, since the question was, whether a certain loss was covered by a policy of fire insurance. If we look elsewhere than to New York, we find no support for the theory of spacial proximity. Thus in fire cases the doctrine of the Ryan case has been frequently repudiated;[29] and in no other class of cases has it even been suggested. In one case[30] a person sent poisoned candy by mail from California to Delaware, where it was eaten by the victim; no difficulty was felt in holding the California sender to be the cause of death, though cause and effect were a continent apart. The argument that there must be proximity in time has no greater force. Thus, in a late case[31] it was held that under the statute of Pennsylvania an action for death

[29] Smith v. London & S. W. Ry., L. R. 6 C. P. 14 (1870); Kuhn v. Jewett, 32 N. J. Eq. 647 (1880); Hoyt v. Jeffers, 30 Mich. 181 (1874); Milwaukee & S. P. Ry. v. Kellogg, 94 U. S. 469 (1876).

[30] People v. Botkin, 132 Cal. 231, 64 Pac. 286 (1901).

[31] Western Union Tel. Co. v. Preston, 254 Fed. 229 (1918).

could be maintained although the accident which caused the death happened ten years before it; the connection between act and result being otherwise uninterrupted. It must be clear that the proximity called for by the principle under discussion is proximity in causation; too many new causes must not intervene between the human act and the result under consideration.

What, then, is this proximity in causation? For understanding it, a little consideration of causal action may prove useful. Take a given situation: forces quiescent, forming a general condition of affairs, what might perhaps be called a set stage. Into this condition a new active force is interjected, creating a rearrangement of affairs, a change of condition, a new event, which we call a result. This is the first step in causation. If, then, a second active force comes upon the scene, causing a new result, this second result is the indirect, not the direct, result of the first active force considered. Or, to vary the case, suppose upon the set stage another active force is working, whether prior to or concurrently with the force we are dealing with, the latter active force operates together with the others in bringing about the result, which is still direct.

The connection of the defendant with the final active force may be sought in two ways. His connection with it may have been an active one; either by himself bringing it into existence, or by causing another person to do so. On the other hand, the defendant may have acted, and the force thereby loosed may have spent itself, coming to equilibrium in the form of a condition of forces which may or not be stable. If, then, this condition is unstable, if it is in appreciable danger of being acted upon by an oncoming force, the

defendant who thus created a condition in the path of an oncoming force stands in a certain causal relation to the later force, though the relation is worked out through the passive line. The same thing may be said if the defendant whose duty it was to change a condition which was in danger of such an oncoming force failed to remove the condition; in that case also he comes into a causal relation with the new force.

Our further discussion will accordingly fall into two heads: first, where the defendant's connection with the final active force consisted in creating or causing it; second, where the defendant created a condition upon which the final force directly acted. To the consideration of the cases grouped in these two classes we now proceed.

IV.

Since, as we have seen, the closest causal connection possible is that between an active force and its direct result, whatever consequences may be proximate certainly this one must be. It is well settled, therefore, that a direct result of an active force is always proximate. Several classes of cases illustrate this principle:

(*a*) Injury direct and immediate, but unforeseeable.

The defendant assaulted the victim; the victim had heart disease, and died of fright. Defendant is the direct and proximate cause of the death.[32]

Fire against which defendant had insured short-circuited a machine, and thus caused such rapidity of action as to wreck the machine. The fire was a direct and proximate cause of the injury.[33]

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[32] State v O'Brien, 81 Ia. 88, 46 N. W. 752 (1890).

[33] Lynn G. & E. Co. v. Meriden Ins. Co., 158 Mass. 570, 33 N. E. 690 (1893).

(*b*) Injury caused by direct transmission of defendant's force, as by one brick in a row being caused to fall upon the next until the last brick is thrown down.

Defendant with his tug wrongfully ran against a pile in the river; the force was transmitted through intervening piles until it threw out a brace to keep two piles apart, and plaintiff's leg was caught between these two piles. This was the direct and proximate result of defendant's act.[54]

Defendant's automobile wrongfully collided with a pushcart and threw it against plaintiff, injuring her; the result is direct and proximate.[55]

A negligent collision of defendant's car with another car threw a standing passenger against plaintiff and injured him; this was a direct and proximate result of the collision.[56]

(*c*) Injury caused by the aggravation of a preëxisting disease or unhealthy condition.

Where a latent disease was aggravated by defendant's act, the act is the direct and proximate cause of the entire result.[57]

Where plaintiff was peculiarly susceptible to poisoning, his serious injury from poison to which his master's act illegally subjected him is the direct and proximate result of the master's act.[58]

(*d*) Injury caused through the creation and later development of a septic or diseased condition.

Where the injury causes septic changes in the body, there being no new outside force concurring, the re-

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[54] Hill v. Winsor, 118 Mass. 251 (1875).

[55] Solomon v. Braufman, 175 N. Y. Supp. (Misc.) 835 (1919).

[56] Mathews v. Kansas City Railways, 104 Kan. 92, 178 Pac. 252 (1919).

[57] Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403 (1891); Hahn v. Delaware, L. & W. R. R., 92 N. J. L. 277, 105 Atl. 459 (1918).

[58] Louisville & N. R. R. v. Wright, 183 Ky. 634, 210 S. W. 184 (1919).

sulting harm is a direct and proximate consequence of the injury.[39]

In one important class of cases, however, the courts seem to have held the opposite view. Where defendant negligently caused a physical injury, the immediate effect of which was the insanity of the injured person, who in a fit of insane mania committed suicide, the death is held not to be a proximate result of the injury.[40] This opinion seems hardly reconcilable with the current of authority on this subject.

(*c*) Injury caused through the subsequent action of already operating natural forces.

The defendant, a master of a vessel, carelessly missed stays in a high wind and flood tide, and the wind and tide carried his vessel against a sea wall and injured it; defendant's negligent act is proximate cause of injury to the wall.[41]

It is to be noticed that the direct result of a *passive* cause is not necessarily proximate; proximity of result following primarily the active line. So where a train stood more than five minutes across a highway, in violation of law, and plaintiff's automobile driving along the highway collided with it, the position of the train was held not be a proximate cause of the collision, but "only a condition."[42]

Plaintiff through defendant's fault fell through a trestle and was rendered unconscious; while he was unconscious he contracted typho-malaria, there preva-

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[39] Development of septicemia: Armstrong v. Montgomery St. Ry., 123 Ala. 233, 26 So. 349 (1899). Development of carbuncle followed by septic infection: Day v. Great E. C. Co., 104 Wash. 575, 177 Pac. 650 (1919). Development of tuberculosis: Pullman Co. v. McGowan, 210 S. W. (Tex. Civ. App.) 842 (1919). Development of tuberculosis: Clarke v. New A. C. Co., 179 Pac. (Cal.) 195 (1919).

[40] Scheffer v. Washington, C. V. M. & Ct. S. R. R., 105 U. S. 249 (1881).

[41] Romney Marsh v. Trinity House, L. R. 5 Ex. 204 (1870).

[42] Gilman v. Central Vermont Ry., 107 Atl. (Vt.) 122 (1919).

lent, and died of it. The court held defendant liable, but it would seem that his negligence was not direct but that other circumstances caused proximity.[42]

Though there is an active force intervening after defendant's act, the result will nevertheless be proximate if the defendant's act actively caused the intervening force. In such a case the defendant's force is really continuing in active operation, by means of the force it stimulated into activity.

(*a*) The simplest case of this sort would be an effective request to the intervening party to act, as in the typical case of A employing B to kill C, or of A commissioning B to make a contract with C. The defendant published a newspaper, in which he printed an advertisement of obscene literature for sale. X ordered the literature in response to the advertisement. Defendant is a proximate cause of the sale.[43]

Defendant made a political speech in the street; persons crowding to hear him climbed upon a pile of paving stones and injured them. Defendant was a proximate cause of the injury.[44]

(*b*) Defendant may by his conduct so affect a person or an animal as to stir him to action; the result of such action is chargeable to defendant.

Defendant shot a dog in front of its owner's house; the dog ran frightened into the house and knocked down a woman. The injury to the woman was a proximate result of the defendant's act.[45]

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[42] Terre Haute & I. R. R. v. Buck, 96 Ind. 346 (1884).

[43] Rex v. De Marny, [1907] 1 K. B. 388 (1906).

[44] Fairbanks v. Kerr, 70 Pa. 86 (1871).

[45] Isham v. Dow, 70 Vt. 508, 509, 41 Atl. 585 (1898). Rowell, J., said: "The law treats the act of the intestate as the proximate cause of the injury, whether the injury was, or could have been, foreseen or not, or was or not the probable consequence of the act, for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events."

Defendant, driving a sleigh, ran into a horse attached to another sleigh; the horse bolted and struck the plaintiff. Defendant is a proximate cause of the injury to plaintiff.[47]

Defendant by threats of violence drove his wife through the house until she jumped out of the window; he was a proximate cause of the injury thereby resulting to his wife.[48]

Defendant while making a street speech violently abusing a certain form of religion, caused the adherents of that form of religion to make an attack upon him, in the course of which some of his auditors were hurt; his act was a proximate cause of the injury.[49]

The defendant by his act may put some one in danger of loss (or of further loss), and that person may thus be caused to act defensively; the direct result of this defensive act is a proximate result of defendant's act. The intervening actor is usually the person whose rights are endangered by defendant's act.

Defendant threw a lighted squib into a crowd; as it was about to hit one in the crowd he threw it away from himself, and it exploded near plaintiff and put out his eye. Defendant was a proximate cause of plaintiff's injury.[50]

Defendant negligently sent out a coach with insufficient harness; a rein broke, and the horses ran. Plain-

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[47] McDonald v. Snelling, 14 All. (Mass.) 290 (1867).

[48] Reg. v. Halliday, 61 L. T. R. 701, 702 (1889). Lord Coleridge, C. J., said: "If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result."

[49] Wise v. Dunning, [1902] 1 K. B. 167 (1901). Compare Beatty v. Gillbanks, 15 Cox C. C. 138 (1882), where in a similar case the praiseworthy motive of the actor seems to have protected him from punishment.

[50] Scott v. Shepard, 2 W. Bl. 892 (1773).

tiff, reasonably believing that the coach was about to capsize, jumped to the ground and was hurt. Defendant was a proximate cause of the injury.[51]

Defendant wrongfully took plaintiff's horse and wagon; plaintiff spent time and money in looking for his property. This expense was a proximate result of defendant's act.[52]

Defendant wrongfully placed an obstruction across that part of a road used as a carriage-road; some one to clear the road removed the obstruction to the footpath; plaintiff, using the footpath in the dark, ran against the obstruction and was injured. This was a proximate result of defendant's act.[53]

Defendant set fire to the grass; plaintiff's wife, in order to save the house, attempted to put the fire out and was burned to death. Her death was a proximate result of defendant's act.[54]

Defendant, while driving a horse in the street, suddenly and negligently pulled around to avoid a coming vehicle; plaintiff, jumping out of the way of defendant's horse, got in the way of the other vehicle and was injured. This injury was a proximate result of defendant's act.[55]

There are very few authorities in conflict with the mass of cases supporting this proposition. One or two may be noticed.

Defendant wrongfully erected a levee. A number of those whose land was flowed cut the levee, flooding plaintiff's land below. The court held the result remote.[56]

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[51] Jones v. Boyce, 1 Stark. 493, 496 (1816). Lord Ellenborough, C. J., said: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

[52] Bennett v. Lockwood, 20 Wend. (N. Y.) 223 (1838).

[53] Clark v. Chambers, 3 Q. B. D. 327 (1878).

[54] Illinois Central R. R. v. Siler, 229 Ill. 390, 82 N. E. 362 (1907).

[55] Boggs v. Jewell Tea Co., 263 Pa. 413, 106 Atl. 781 (1919).

[56] Bentley v. Fischer L. & M. Co., 51 La. Ann. 451, 25 So. 262 (1899).

Defendant started a prairie fire; plaintiff in attempting to put it out by a back-fire was burned. The injury was remote from defendant's act.[57] This was a decision by the notorious Robinson, J. His language on this point is worth quotation:

"When the fire was started, it was not subject to the control of any person, and it behooved all persons to keep out of its way. 'No man is responsible for that which no man can control.' Maxims (Comp. Laws 1913, § 7260). Even if defendant was negligent in permitting the fire to escape from his land, he was liable only for the proximate loss, and not for a death resulting from a person rushing into or in front of an onrushing flame. Such a loss is too remote."

Comment is unnecessary.

The intervening person may be a third person, acting either of his own motion or by employment of the person whose rights are in danger.

Defendant placed some one in danger of death; plaintiff was injured in an attempt to save him; the injury is a proximate consequence of defendant's act.[58]

Defendant negligently set fire to a child's clothes; the child's mother burned her hands while extinguishing the flame. This was a proximate result of defendant's act.[59]

Defendant wrongfully filled plaintiff's cellar with explosive illuminating gas; plaintiff sent a plumber into the cellar to find the leak. The plumber lit a match to find the leak, and the gas exploded, damaging plaintiff's house; this was a proximate result of defendant's act.[60]

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[57] Hogan v. Bragg, 170 N. W. (N. D.) 324 (1918).
[58] Eckert v. Long Island R. R. Co., 43 N. Y. 502 (1871); Bond v. Baltimore & O. R. R., 96 S. E. (W. Va.) 932 (1918).
[59] Wichita F. T. Co. v. Hibbs, 211 S. W. (Tex. Civ. App.) 287 (1919).
[60] Burrows v. March Gas Co., L. R. 5 Ex. 67 (1870).

This is the basis of the responsibility of the person causing a personal injury for the act of a physician or surgeon in attempting to cure the wound.

Defendant wounds plaintiff, who calls a physician to cure him; the physician, whether carefully or negligently, does an act which injures plaintiff; this is a proximate result of the wound.[81]

It is to be noted that the defendant is responsible for the physician's act only if that act is *bona fide* intended as an attempt to cure the harm inflicted by defendant. If the physician should seize the opportunity to experiment, or maliciously to harm the victim, the defendant's act would not cause the physician's. In the Bush case[82] the attending physician communicated scarlet fever to the defendant's victim. This was held not a proximate consequence of defendant's act. Nor is defendant responsible for a mistake of a nurse, employed to carry out the directions of the physician, who administers a wrong and harmful remedy.[83]

The defendant by his attack upon another may cause the person attacked (or that person's husband) to act in defense, and thereby be the proximate cause of the direct result of such action.

An assured person made an attack upon a woman; her husband in her necessary defense killed him. The assured person caused his own death.[84]

Defendant attacked a railroad train to rob it; defensive shots from the train killed a third person; defendant is a proximate cause of the death.[85]

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[81] Com. v. Hackett, 2 Allen (Mass.) 136 (1861); Purchase v. Seelye, 231 Mass. 413, 121 N. E. (Mass.) 413 (1918); Hoopman v. Reeve, 168 Wis. 420, 170 N. W. 282 (1919).

[82] Bush v. Com., 78 Ky. 268 (1880).

[83] Thompson v. Louisville & N. R. R., 91 Ala. 496, 8 So. 406 (1890).

[84] Bloom v. Franklin L. I. Co., 97 Ind. 478 (1884).

[85] Keaton v. State, 41 Tex. Cr. R. 621, 57 S. W. 1125 (1900). Defendants were forcing this person to accompany them; but the court was willing to decide the case without relying upon that additional fact.

Defendant joined in an attack upon an armory; soldiers stationed in the armory fired defensively into the mob, and killed a bystander. Defendant upon this ground should have been held a proximate cause of the death; but the court, in a questionable decision, held that he was not so.[66] The decision was not *in banc*, but at the trial of the case.

There is one state, however, which seems not to have accepted the doctrine of the cases just considered. In Pennsylvania, in cases of every sort, the courts have usually refused to regard the direct result of an active force as proximate unless it is foreseeable.

An engine on defendant's railroad negligently hit a woman at a crossing and threw her body against plaintiff, injuring him; this was held to be a remote result of hitting the woman.[67]

In one case, however, the Pennsylvania court has dealt with this subject as it would have been dealt with in states following the general rule.[68] The facts in that case were these: A spur track left the main track and joined it again a hundred feet farther on. The engineer of a small locomotive on the spur track carelessly ran into a passing passenger train. Just before the collision he reversed his engine, then closed the throttle and jumped out. The force of the collision threw the throttle open and the locomotive backed along the spur track and collided with the passenger train at the other end of the track, which the train had just reached, injuring plaintiff. The court held that the injury was a proximate consequence of the negligent collision. The court said:

"The engineer would be held to have foreseen whatever consequences might ensue from his negligence

[66] Cosa. v. Campbell, 7 All. (Mass.) 541 (1863). The decision has unfortunately been followed. Butler v. People, 125 Ill. 641, 18 N. E. 338 (1888); Com. v. Moore, 121 Ky. 97, 88 S. W. 1085 (1905).

[67] Wood v. Pennsylvania R. R. Co., 177 Pa. 306, 35 Atl. 689 (1896).

[68] Bunting v. Hogsett, 139 Pa. 363, 21 Atl. 31, 33, 34 (1891).

without the intervention of some other independent agency, and both his employer and himself would be held for what might, in the nature of things, occur in consequence of that negligence, although, in advance, the actual result might have seemed improbable."

V.

If the defendant's active force has come to rest, but in a dangerous position, creating a new or increasing an existing risk of loss, and the foreseen danger comes to pass, operating harmfully on the condition created by defendant and causing the risked loss, we say that the injury thereby created is a proximate consequence of the defendant's act.

A sick seaman was sent aloft by the master of the vessel, it being apparent that he was in danger there; the seaman by reason of his weakness fell overboard. This was a proximate result of the master's act.[8]

Defendant undertook to carry plaintiff to San Francisco by way of the Isthmus, but delayed and finally abandoned transportation on the Isthmus, leaving plaintiff in an unhealthy climate. Plaintiff contracted fever. This was a proximate result of defendant carrying plaintiff to the Isthmus and no further.[9]

Defendant wrongfully let down the bars of a pasture where plaintiff's sheep were kept; the sheep wandered out and were eaten by bears. If the jury found that the wandering of the sheep to where bears were was a danger of the situation, they should find for plaintiff.[10]

Defendant built an embankment across land of plaintiff with insufficient provision for carrying off the water of a river. In a flood the water was banked up against the embankment, and finally broke through

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[8] United States v. Freeman, 4 Mason (U. S.) 505 (1827).
[9] Williams v. Vanderbilt, 28 N. Y. 217 (1863).
[10] Gilman v. Noyes, 57 N. H. 627 (1876).

and injured plaintiff's land below. This was a proximate result of building the insufficient embankment.[72]

Defendant sent plaintiff into a tank filled with gasoline vapor; plaintiff was given an electric lamp on the end of a cord to light up the tank. The lamp was broken against the side of the tank, and the resulting spark exploded the vapor, injuring plaintiff. The court, finding that such an event should have been foreseen, held the result proximate.[73]

Defendant sold and delivered a jug of sulphuric acid not labeled as poison; the purchaser put it where plaintiff drank it, believing it to be buttermilk, and was poisoned; defendant was a proximate cause.[74]

A manufacturer sold a loaded rifle as unloaded; it was accidentally discharged and injured plaintiff; the injury was a proximate result of the manufacturer's act.[75]

On the other hand, where defendant's active force has come to rest in a position of apparent safety; the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from defendant's act.

Defendant threw a skin out of a window, and it came to rest upon the ground. A wind later lifted the skin from the ground, and it was thrown against plaintiff and injured him. The injury was not a proximate result of the defendant's act.[76]

Defendant railroad put plaintiff, a passenger, off the train at the wrong station; she was forced to spend the night at a hotel there, and was injured by the explosion

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[72] Zollman v. Baltimore & O. S. W. R., 121 N. E. (Ind. App.) 135 (1918).
[73] Standard Oil Co. v. Allen, 121 N. E. (Ind. App.) 329 (1918).
[74] Burk v. Creamery P. M. Co., 126 Iowa, 730, 102 N. W. 793 (1905).
[75] Herman v. Markham A. R. Co., 258 Fed. 475 (1918).
[76] Rex v. Gill, 1 Stra. 190 (1719).

of a lamp in her room. The injury was not proximate to defendant's act."

The form of rule above stated is believed really to state the true distinction, and the one actually enforced by the courts. The wording of it, however, is not that ordinarily used. The commonest phrase, probably, is that the injury shall be the natural and probable result of the act; a phrase which involves at least a misuse of both adjectives. A more accurate phrase, which is gaining in use, is that the intervening force, unless it is to make the result remote, must be foreseeable. This phrasing is not far from accurate; but it leads to a wrong result in one class of cases, soon to be considered.

It will be noticed that in cases of the sort under discussion the jury must usually be called upon to solve a difficult problem: whether a risk was created by the defendant, or, as it is usually phrased, whether the result (or more accurately, the intervening force) was foreseeable. In the cases heretofore considered, there was seldom a disputed fact to be left to the jury. Given the causation of the second force by the first, seldom a matter of doubt, the proximity was a mere question of law. In the cases now under examination, however, the question of risk is usually one of doubt, the answer to which must be found by the jury. Much, therefore, depends upon how the question comes up. Does it arise on a demurrer to the evidence, or an exception to the direction of a verdict or to the failure to direct one? The question then is, whether on the facts as given the jury could properly find a risk—not what the court would find. On the other hand, if the case has gone to the jury, the only question can be, Is there reason to disturb the verdict? In the first case the Appellate

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" Central of Georgia Ry. v. Price, 100 Ga. 170, 32 S. E. 77 (1898).

Court must reverse the proceedings if there is a case for the jury; in the second case, it must affirm proceedings. In neither case is the Appellate Court at liberty to express its own idea of the facts.

This distinction, as well as the general rule, may be illustrated by the following cases.

(*a*) Cases where the jury should have been allowed to find a verdict; a directed verdict, or a demurrer to the evidence, was set aside.

Defendant turned a stream of water on the sidewalk in freezing weather; a passer-by slipped on the ice thereby caused, and was injured.[78]

Defendant fails to light a staircase in a tenement house, as he was legally obliged to do; plaintiff, a tenant, fell down stairs in the dark and was injured. This is a proximate result of the defendant's breach of duty.[79]

Defendant negligently left a service pipe with an open end under plaintiff's house and turned on odorless illuminating gas; plaintiff went under the house with a match to examine a supposed leak in a water pipe, and was injured by an explosion. This was held a proximate result of defendant's act.[80]

In case of the creation of a dangerous situation by failure to protect a dangerous structure the jury should pass on the question. So of imperfect insulation of electric wire at a point where persons might come in contact with it;[81] disrepair of a lever for stopping a machine dangerous to workmen;[82] failure to keep wall

[78] Cochran v. Barton, 233 Mass. 147, 123 N. E. 505 (1919).
[79] Tannenbaum v. Lindenberg, 105 Misc. 307, 173 N. Y. Supp. 68 (1918).
[80] Hahn v. Southwestern Gas Co., 82 So. (La.) 199 (1919).
[81] Olm v. New York & Q. E. L. & P. Co., 188 App. Div. 19, 176 N. Y. Supp. 370 (1919).
[82] P. Bannon P. L. Co. v. Page, 183 Ky. 367, 209 S. W. 4 (1919).

of shooting-gallery tight enough to prevent glancing bullets; [45] failure to light a structure within a railroad right-of-way at night;[46] failure to place a light upon a pile of bricks near a sidewalk.[47]

The defendant negligently struck the plaintiff, a police officer, and broke his leg; while convalescent and on crutches his crutch slipped, and he fell, breaking his leg a second time. The court held that the jury might find that his condition created a risk of this fall, or in the language of the court that the second fracture was a natural and probable result of the original injury.[48]

On the other hand, a demurrer to the evidence was allowed by the Supreme Court of Canada in a case which might well have gone to the jury. The defendant, a telephone company, wrongly extended a "guy wire" from its pole, which stood on the highway line, about four feet into the highway. The place into which it was extended was a grassed "bank" about six inches higher than the roadway. The plaintiff was driving along the road when his team became frightened and ran, swung up on the grass, caught the wheel on the wire, and threw out the plaintiff.[49] It is submitted that the case should have been given to the jury.

(*b*) But where the case is regarded as so clear that a jury could not be allowed to find a verdict for the plaintiff, the court has held it proper to direct a verdict for the defendant.

A workman attempted to alight from a slowly moving car, and his clothing was caught by a bolt on the

[45] Larson v. Calder's Park Co., 189 Pac. (Utah) 589 (1919).

[46] Norfolk & W. Ry. v. Whitehurst, 99 S. E. (Va.) 568 (1919).

[47] Sutter v. Metropolitan St. Ry., 208 S. W. (Mo. App.), 851 (1918).

[48] Hartnett v. Tripp, 231 Mass. 382, 121 N. E. 17 (1918). The court did not mention the cases of Wineberg v. Du Bois, 209 Pa. 430, 58 Atl. 807 (1904), or Snow v. New York, N. H. & H. R. R., 185 Mass. 321, 70 N. E. 205 (1904), in which the defendant was held not liable for consequences where a fall intervened. The latter case is probably distinguishable.

[49] Eberhardt v. Glasgow M. T. Assoc., 91 Kan. 763, 139 Pac. 418 (1914).

car so that he was carried along against his will and struck and hurt a fellow workman who at his order had previously stepped out and was walking alongside the car. The court held that this was not a proximate result of the order to leave the car. Whether it was a proximate result of the defendant's attempt himself to leave the car is a closer question, though it would probably be decided in the same way.[58]

Defendant blocked a public way by wrongfully leaving a wagon standing in it; plaintiff, driving through, was injured in attempting to get by the wagon; this is not a proximate result of defendant's act.[59]

This principle is or may be relied upon in cases where the lack of safety device or protection required by statute or ordinance is a proximate cause of an injury by failure of the protection; since the requirement proves the danger to exist, and the finding of a jury is unnecessary.[60]

(*c*) If the court itself passes on the facts, as it does in admiralty, this distinction is of course not applicable.

Defendant maintained a bridge with a swinging draw; a vessel gave the signal to pass through the draw; the persons employed to open the draw were unreasonably slow, so that it did not swing quite clear of the vessel, which hit the draw so as to increase its speed. The employees then failed to stop the draw at the proper place, so that it swung by and hit the vessel again as it was leaving the draw, injuring it. The court of Admiralty passed upon the whole question, drawing inferences of fact, and held that this injury

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[58] Woodward Iron Co. v. Gamble, 81 So. (Ala.) 810 (1919).

[59] Davis v. Mellen, 182 Pac. (Utah) 920 (1919).

[60] Fence around an excavation: Johnson v. Denison, 173 N. W. (Iowa) 46 (1919); Fernald v. Eaton, 180 Pac. (Cal. App.) 944 (1919). Fence around an area way (verdict directed for plaintiff): Rose v. Gunn Fruit Co., 211 S. W. (Mo. App. 85 (1919).

was a proximate result of defendant's unreasonable delay in opening the draw, and of its failure to stop it."[a]

It has been argued that the mere fact of the new force being foreseeable will not make the result proximate to defendant's act; it is so only where the risk of the new force was created or increased by the act. This is believed to be the rule upon which the courts actually proceed.

The application of the rule can best be studied in the actual decisions.

If the injury takes place by an active force which was threatening at the time of defendant's acting, the danger of which was not increased by defendant's action, in spite of the fact that he foresaw its operation, he has added no active danger to the situation and the loss does not result proximately from his act.

So where a railroad improperly delays carriage, and then starts it again, and in later crossing a flood-plain the goods are destroyed by a flood, the chance of which was as great at the time the goods should have been at the place as at the time they were there, the delay should not be regarded as a proximate cause of the flood."[b]

These cases gave rise to a long controversy not yet settled; the authorities are still divided. They are collected in *Green Wheeler Shoe Co. v. Chicago, R. I. & P. R. R.*"[c]

A little care in the analysis of the situation will make the above statement plain. The railroad has done two things, either of which might conceivably be the foundation of liability:

1. It has wrongfully ceased to carry; a failure to do

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[a] New England F. & T. Co. v. Boston, 257 Fed. 778 (1919).

[b] Denny v. New York Central R. R., 13 Gray (Mass.) 481 (1859). Contra: Michaels v. New York Central R. R., 30 N. Y. 564 (1864).

[c] 130 Iowa, 123, 106 N. W. 499 (1906); 1 Sedgwick on Damages, 9 ed., II 119-119b.

what by law it ought to do. This, however, so far from causing the loss, would absolutely prevent it, unless the delay is itself in a dangerous place; if so, the carrier is liable for the danger overtaking it there.

2. It has started the goods on again after the delay, and kept them going. If at this time the foreseeable danger were greater than at the time the delay began, it is admitted that this would be a proximate cause of the loss; but if not, the danger was one that the carrier was bound to run in the carriage of the goods. In fact, under such circumstances (assuming he was justified at the beginning in receiving the goods to be carried, i. e., that the danger was not a serious one and unknown to the shipper) the carrier would be violating its duty to the shipper if it did not carry the goods on.

If, however, there is no special danger at any particular point, but a constant risk of carriage which is necessarily increased by delay, the delay, since it causes the prolongation of the carriage, is a proximate cause of the loss due to the risk.[*]

The doctrine of "attractive nuisance," so called, is one of the law of Torts no less than of Causation; but it involves a causative element. One who leaves a thing which attracts children to play with it, in a place where children can get it, thereby creates a situation of active danger; and if the act of the child brings about a catastrophe, it is a proximate result of leaving the thing about.

Defendant left an unlocked push-car near its railroad where children could get at it; a child pushed it on the track and was killed by a train. If the act of a

[*] Risk of freezing in winter: Fox v. Boston & Me. R. R., 148 Mass. 220, 19 N. E. 222 (1889); O. J. Barnes Co. v. Northern Pac. Ry., 173 N. W. (N. D.) 945 (1919). Risk of forest fire in summer: Bell Lumber Co. v. Bayfield T. Ry. Co., 172 N. W. (Wis.) 955 (1919). Risk of chilling livestock: Strother v. Atchison, T. & S. F. Ry., 212 S. W. (Mo. App.) 404 (1919); Smart v. Oregon Short Line R. R., 183 Pac. (Utah) 330 (1919).

child could have been foreseen, defendant is a proximate cause of the death."

This doctrine is the basis of the explosives cases. Defendant gives a child a pistol, explosive cap, or something which by exploding would cause injury, or leaves it in the child's way; he is a proximate cause of any injury the child may do with it, so long as it remains in his hands."

It is to be noticed that if the explosive gets into the hands of an adult the defendant's force has ceased to be an active danger; if the explosive thereafter gets into the hands of a child, defendant is not the proximate cause of anything this child may do with it."

It is often said that where a criminal, or as it is often put, an illegal act of another, intervenes after the defendant's act, the latter ceases to be a proximate cause.

Defendant wrongfully left open a gap in the plaintiff's basement wall: thieves entered and stole plaintiff's goods. Defendant was not a proximate cause."

Defendant wrongfully let a dangerous criminal escape; he was not a proximate cause of the injury done by the criminal, and foreseeable at the time of the escape."

" Pollett v. Illinois Cent. R. R., 288 Ill. 506, 123 N. E. 592 (1919).

" Binford v. Johnston, 82 Ind. 426 (1882); Chaddock v. Plummer, 86 Mich. 225, 50 N. W. 135 (1891); Anderson v. Newport Mining Co., 202 Mich. 204, 168 N. W. 523 (1918); Lathrop v. Bagwell, 206 S. W. (Tex. Civ. App.) 371 (1918). In Hale v. Pacific Tel. & Tel. Co., 183 Pac. (Cal. App.) 280 (1918), the courts said that there was nothing in the evidence to show that the defendant could anticipate that a child would come upon its premises and get the explosive where it was kept; if there were such evidence, the jury might find the result proximate.

" Chaddock v. Plummer, 86 Mich. 225, 50 N. W. 135 (1891); Pittsburg Reduction Co. v. Horton, 87 Ark. 576, 113 S. W. 647 (1908).

" Andrews v. Kinsel, 114 Ga. 330, 40 S. E. 301 (1901).

" Hullinger v. Worrell, 83 Ill. 220 (1876); Henderson v. Dade Coal Co., 100 Ga. 568, 28 S. E. 251 (1897).

This was a principal ground for holding the Cunard Steamship Company not liable for injuries suffered from the sinking of the Lusitania.[100]

In spite, however, of much authority to this effect, the statement must be regarded as exceedingly questionable. If an employee of a storage warehouse should leave a window open, it is submitted that the stealing of the goods would be a proximate result.

In all cases where the act or failure to act of the plaintiff himself was a factor, he might in a civil suit be barred of his recovery by his own contributory negligence. Where this is the case it has often been said that the result is remote. But so to say is to confuse two very different things. That there may be proximate causation, though the injured person is contributorily negligent, is shown in criminal cases, where contributory negligence of the injured person is no bar.

Defendant wounded X's finger; X refused to have the finger amputated, though the surgeon urged it, got lockjaw and died. The death was a proximate result of defendant's act.[101]

A neglect of this principle led to what is submitted is a wrong result. Defendant, a carrier by automobile for hire, negligently failed to stop at plaintiff's house, and plaintiff negligently jumped out of the moving car and was injured. The defense of contributory negligence had been abolished by statute. The court held the injury a remote consequence of defendant's failure to stop.[102]

To sum up the requirements of proximity of result:

1. The defendant must have acted (or failed to act in violation of a duty).

[100] The Lusitania, 251 Fed. 715 (1918).
[101] Reg. v. Holland, 2 Moo. & Rob. 351 (1841).
[102] Dantzler S. & D. D. Co. v. Hurley, 119 Miss. 473, 81 So. 163 (1919).

2. The force thus created must (*a*) have remained active itself or created another *force* which remained active until it directly caused the result; or (*b*) have created a new active *risk* of being acted upon by the active force that caused the result.

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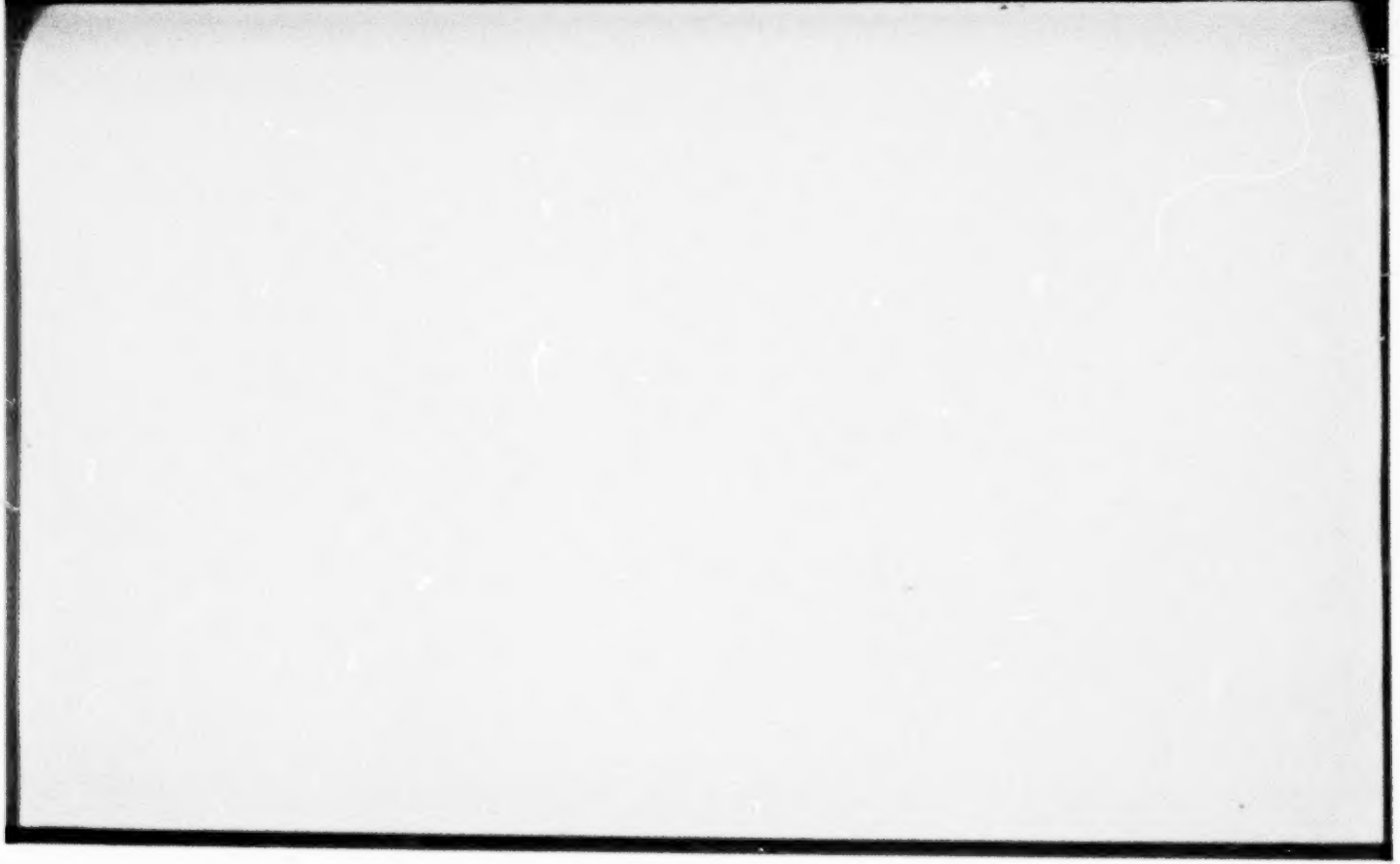
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